Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 18th March, 2004 (Phalguna 28, 1925)

SERIES II No. 51

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

Order

No. 28/7/2001–LAB

The following Award dated 3-6-2002 in reference No. IT/7/96 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Angela Menezes, Joint Secretary (Labour).

Panaji, 10th June, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/7/96

Shri Sebastiao A. Ticro & 2 ors.,
Rep. by Adv. Nuno Alvares Colaco,
H. No. E/66, Dr. Dada Vaidhya Road,
Panaji-Goa. — Workmen/Party I

V/s

The Director of Administration,
Public Works Dept.,
Panaji-Goa. — Employer/Party II

Party I - Represented by Adv. Shri N. Colaco.

Party II - Represented by Adv. Shri G. D. Kirtani.

Panaji, dated: 24-5-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947, the Government of Goa by order dated 19-1-1996 bearing No. 28/62/95-LAB referred the following dispute for adjudication by this Tribunal.

(A) Whether Shri Sebastiao A. Ticro is entitled to the pay of Rs. 216-66 (Escodos 1300) with effect from 1-2-1996 and Rs. 233-35 (Escodos 1400) with effect from the date of absorption and subsequent revision of pay scale as recommended by the Pay Commissions from time to time?"

(B) Whether Shri Mannual Sequeira and Joao F. Fernandes are entitled to the scale of Rs. 216-65 (Escodos 1300) with effect from 1-2-1968 and subsequent revision of pay scale as recommended by the Pay Commissions from time to time?"

If not, to what relief the above workmen are entitled?"

2. On receipt of the reference a case was registered under No. IT/7/96 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workmen/Party I (for short, 'Workmen') filed their statement of claim at Exb. 8. The facts of the case in brief as pleaded by the workmen are that in terms of Decreto No. 42325 dated 16-6-1959 the workman Shri Sebastiao A. Ticro, retired Turner Grade I of Public Works Department, on revision of pay was entitled to higher pre-liberation pay of Rs. 216.65 (1300 escodos) as Asst. Turner w. e. f. 6-7-1961 and from the date of absorption i. e. from 1-2-66 he was entitled to higher pre-liberation pay of Rs. 233.35 (1400 escodos) as Turner Grade I or Sr. Turner. That however, the Director of Administration, Public Works Department (for short, "employer") without taking into consideration the said decreto arbitrarily granted lower pay of Rs. 110/-(660 escodos) as Asst. Turner and also lower scale w. e. f. 6-7-61 and the lower pay of Rs. 216.65 (1300 escodos) as Turner Grade I or Sr. Turner and accordingly on

absorption i.e. from 1-2-66 his pay was fixed on lower pre-liberation pay of Rs. 216.65. That his salary was fixed at Rs. 131/- p. m. as basic pay and personal pay of Rs. 85.65 in the scale of Rs. 110-3-131 w.e.f. 1-2-66 thereby denying him appropriate pay under Portuguese administration or scale of Rs. 125-3-131-4-155 based on pre-liberation pay of Rs. 233.35(1400 escodos). That the said scale of Rs. 125-155 was granted to Sr. Turners in the River Navigation Department and the Electricians in the Public Works Department on their absorption on 1-2-66 who prior to liberation was drawing Rs. 233.35 as drawn by the workman Shri Sebastiao A. Ticro. That in terms of the said decreto No. 42325 dated 16-6-59 the workman Shri Manuel Sequeira and Shri Joao Fernandes, Fitters in Grade I of Public Works Department, on revision of pay under Portuguese administration were entitled to higher pre-liberation pay of Rs. 216.65 (1300 escodos) as Fitter Grade II w.e.f. 1-2-66 i. e. from the date of absorption and from 1-2-68 i. e. from the date of their appointment/promotion to the post of Fitters Grade I or Sr. Fitters they were entitled to higher pre-liberation pay of Rs. 233.35 (1400 escodos) in terms of the said decreto No. 42325 dated 16-6-59. That the assalariado employee turners getting pay of Rs. 1200 escodos or Rs. 216.65 p. m. in terms of Diploma Legislative No. 1848 dated 6-11-58, on revision were granted increased pay of Rs. 1400 escodos or Rs. 233.35 p. m. as per Diploma Legislative No. 2099 dated 6-7-1961 and decreto No. 42325 dated 16-6-1959 and assalariado employee Asst. Turners and Asst. Fitters getting pay of Rs. 660 escodos or Rs. 110/- p. m. in terms of the said Diploma Legislative No. 1848 dated 6-11-1958 were also granted increased pay of Rs. 1300 escodos of Rs. 216.65 p. m. as per said Diploma Legislative No. 2099 dated 6-7-1961 and decreto No. 42325 dated 16-6-1959. That however, the employee ignoring the above aspect of revisional pay arbitrarily granted lower pay of Rs. 660 escodos or Rs. 110/- p. m. and on subsequent absorption revisions in pay were done on the said lower pay of Rs. 660 escodos or Rs. 110/- p. m. thereby causing huge monetary loss to the workman. The workmen therefore prayed that, the workman Shri Sebastiao Araujo be granted revised pre-liberation pay of Rs. 216.65 (1300 escodos) w. e. f. 6-7-1961 and Rs. 233.35 (1400 escodos) from the date of his absorption i. e. from 1-2-1966 and subsequent revision of pay scale as recommended by the Pay Commissions from time to time. The workmen also prayed that the workmen Shri Manual Sequeira and Joao Fernandes be granted revised pre-liberation pay of Rs. 216.65 (1300 escodos) w.e.f. 1-2-1966 i.e. from the date of their absorption and Rs. 233.35 (1400 escodos) from the date of their appointment/promotion to the post of Fitter Grade I or Sr. Fitters and the subsequent revision of pay scale as recommended by the Pay Commissions from time to time.

3. The employer filed written statement at Exb. 4. The employer stated that the workmen had also raised dispute before the Labour Commissioner and after discussions were held on 8-5-87 they requested that the issue may be treated as closed and accordingly the Labour Commissioner passed the order dated 8-5-87 treating the issue as withdrawn. The employer stated that prior to liberation the Asst. Turners and Asst. Fitters were drawing salary of Rs. 216/- p. m. and the Government of India equated these posts as Turners Grade I and Fitters Grade I in the pay scale of Rs. 110-131. The employer stated that the contention of the workmen that they were absorbed in the higher post of Turner Grade I and Fitter Grade I which carried a pay of Rs. 233/- p.m. is not correct and further stated that they were absorbed against the equated post of Turner Grade I and Fitter Grade I in the pay scale of Rs. 110-131. The employer stated that the workmen have been placed in the appropriate scale and that no prejudice or monetary loss is caused to the workman. The employer stated that the pay scale of Rs. 110-155 is prescribed by the Government of India to the post of Turners, Fitters and Mechanics borne on the work charged establishment in the Central Public Works Department and it is revised to Rs. 260-350/- by the Third Pay Commission. The employer stated that the employees borne on the said cadre were governed by separate set of rules and regulations envisaged in the Central Public Works Department Manual Volume III and the scales prescribed in the posts of work charged establishment cadre were different and could not be made applicable to the posts borne on regular establishment for which specific pay scales were prescribed by the Government of India on their absorption under Goa, Daman and Diu (Absorbed Employees Conditions of Service) Rules, 1961. The employer stated that the workmen absorbed as Turners Grade I and Fitters Grade I were rightly given the prescribed scale of Rs. 110-131 and therefore the question of granting higher pay scale to them on their absorption from 1-2-66 does not arise. The employer denied that the workmen are entitled to any relief as claimed by them. The workmen thereafter filed rejoinder at Exb. 5.

4. On the pleadings of the parties, following issues were framed.

1. Whether the dispute referred by the Government is an individual dispute and not an industrial dispute and hence reference is not maintainable?

2. Whether the workman Shri Sebastiao A. Ticro proves that he is entitled to the pay of Rs. 216.35 (Escodos 1300) corresponding to letter "X" w.e.f. 6-7-61 and revised pay of Rs. 233.35 (Escodos 1400) corresponding to letter "V" from the date of absorption i.e. from 1-2-1966 and to the subsequent revision of pay scale as recommended by the Pay Commission from time to time?

3. Whether the workmen Shri Manuel Sequeira and Shri Joao F. Fernandes prove that they are entitled to the pay of Rs. 216.35 35 (Escodos 1300) corresponding to letter "X" w.e.f. 1-2-1966 and pay of Rs. 233.35 corresponding to letter "V" w.e.f. 1-2-1968 i. e. from the date of their appointment/ /promotion to the post of Fitters Grade I or senior

Fitters and to the subsequent revision of pay scale as recommended by the Pay Commission from time to time?

4. Whether the workmen are entitled to any relief ?

5. What Award?

5. The Issue No. 1 was treated as preliminary issue as it related to the very maintainability of the reference. The workmen as well as the employer led evidence on the said issue. My findings on the said issue No. 1 is as follows:

Issue No. 1: In the affirmative.

REASONS

6. *Issue No. 1*: The workmen as well as the employer have filed written arguments in support of their rival contentions. The workmen have submitted that once the reference is made by the Government the Tribunal has to adjudicate the dispute and it cannot be avoided. In support of this contention the workmen have relied upon the judgment of the Calcutta High Court in the case of Oil India Limited v/s G. N. Borah reported in 1977 Lab. IC 1610. The workmen have submitted that the Public Works Department and the Irrigation Department of the Government are held to be "industry" under the Industrial Disputes Act, 1947 as per the Judgment of the Punjab and Hariyana High Court in the case of State of Punjab, through the Executive Engineer, Provincial Division, P. W. D. (B&R) Jullunder v/s Kishan Singh reported in 1995 (4) SLR 247; the Judgment of the Supreme Court in the case of Des Raj v/s State of Punjab reported in AIR 1988 SC 1182 and in the case of OM Prakash v/s Executive Engineer (S. Y. L) Kurukshetra reported in 1984 Lab. I. C. 1165, and that the workman Shri Sebastiao Ticro has produced the letter dated 7-7-88 in his evidence mentioning the duties and responsibilities of Turners and Fitters and therefore the dispute referred by the Government is an Industrial Disputes. The workmen have submitted that Sec.2(k) of the Industrial Disputes Act includes a dispute between an employer and a single employee also as per the judgment of the Supreme Court in the case of Central Provinces Transport Services Ltd., v/s Raghunath Gopal Patwardhan reported in AIR 1957 SC 104. They have submitted that the existence of other remedy does not bar him from raising industrial dispute as held by the Supreme Court in the case of J. Bhagwan v/s Management of Ambala Central Coop. Bank Ltd., reported in AIR 1984 S. C. 286. The workmen have submitted that the word "workmen" used in plural in the definition of "industrial dispute" does not by itself exclude the application of the Act to individual dispute as under Sec. 13(2) of the General Clauses Act the words in plural include singular and vice versa. In this respect the workmen have relied upon the Judgment of the Supreme Court in the case of Newspaper Ltd., v/s State Industrial Tribunal, U. P. reported in AIR 1957 S.C. 532. The workmen have stated that the fact that the Government has referred the dispute for adjudication pursuant to the failure report proves that the plea of the employer that the dispute was withdrawn is fallacious and illogical. The workmen have stated that the above submissions made by them show that the reference is maintainable.

7. The employer on the other hand has submitted that the workmen have not produced any documentary or oral evidence to show that the dispute referred by the Government is an industrial dispute, and that Shri Hipolito D'Mello, the witness examined by the employer has stated in his evidence that the dispute was raised individually by the workmen and not through the union and further that they withdrew the dispute to enable them to approach the appropriate authority that is the Central Administrative Tribunal. The employer has submitted that the minutes of the meeting produced at Exb. E-1 supports its above contention and the workman has admitted in the evidence that the Labour Commissioner had treated the dispute as withdrawn as per the said minutes of the meeting. The employer has submitted that no evidence has been produced by the workmen to show that the dispute was espoused by the union. The employer has submitted that individual dispute becomes industrial dispute only if it is supported by the union or by a number of workmen. In support of this contention the employer has relied upon the judgment of the Supreme Court in the case of workmen of M/s Dharam Pal Prem Chand (Saugandhi) v/s M/s Dharam Pal Prem Chand reported in AIR 1966 SC 182. The employer also relied upon the judgment of the Supreme Court in the case of the Bombay Union of Journalists and others v/s The "Hindu", Bombay and another reported in AIR 1963 SC 318 and in the case of the workmen of Ranga Vilas Motors (P) Ltd. v/s Shri Ranga Vilas Motors (P) Ltd., and others reported in AIR 1967 SC 1040, in support of its contention that the dispute referred is an individual dispute and not an industrial dispute.

8. The workmen have contended that once the reference is made by the Government the Tribunal has to adjudicate the dispute and it cannot be avoided. In other words the contention of the workmen is that once the reference is made by the Government, no objection as to the maintainability of the reference can be raised and the Tribunal is bound to decide the reference on merit. The workmen have relied upon the judgement of the Calcutta High Court in the case of Oil India Ltd. (supra) in support of their contention. I have gone through the said judgment of the Calcutta High Court and I am of the view that the said judgment is not applicable to the issue involved in the present case. In that case the Industrial Tribunal had refused to adjudicate the dispute with reference to some of the workmen on the ground that they had already filed an application before the Labour Court under Sec. 33-C (2) of the Industrial Disputes Act which was capable of giving adequate relief to them. The High Court held that the Tribunal was under a statutory obligation to adjudicate the dispute referred to it by the appropriate Government and such adjudication cannot be avoided or relinquished. In that case the High Court has not held

that no objection as to the maintainability of the reference can be raised or that the Tribunal cannot decide whether the reference is maintainable or not and that it is bound to decide the reference on merits. The exact authority on the point is the judgment of the Bombay High Court in the case of Iqbal Ahmed Kamruddin v/s P. C. Muzumdar reported in 1992 (64) FLR 827. The Bombay High Court in para. 8 of its judgment has held as follows:

> "If what is referred to a Tribunal/Labour Court is not an industrial dispute, it is always open to a party to show to the forum that the dispute referred for adjudication though purported to be an industrial dispute, is in reality not an industrial dispute at all. This has always been recognised as an exception to the general rule postulated in Sec. 10(4). It is therefore always permissible for an employer to raise an issue as to whether what has been referred is an industrial dispute at all and there can be no question of the Tribunal being bound by the order of the reference. It is a settled law that the appropriate Government makes a reference upon the prima facie view of the matter as to the existence or apprehension of an industrial dispute; it is open to the parties to show that what is referred is not in reality an Industrial Disputes at all."

Therefore as per the law laid down by the Bombay High Court in the above referred case, the employer is entitled to raise an objection that the dispute referred is not an industrial dispute even after the reference is made by the Government. In a reference, if the Tribunal decides that the dispute referred is not an industrial dispute and hence the reference is not maintainable, it amounts to adjudicating of the reference by the Tribunal, and not avoiding to adjudicate it.

9. The workmen have contended that the dispute referred is an industrial dispute because the Irrigation Department of the Government is held to be an "Industry" under the Industrial Dispute Act 1947 as per the various judgments relied upon by them and in view of the duties and responsibilities of the Turners and Fitters mentioned in the letter dated 7-7-88 produced by the workman Shri Sebastiao A. Ticro. The workmen relying on the judgment of the Supreme Court in the case of Central Provinces Transport Services Limited (supra) have contended that Sec. 2(k) of the Industrial Disputes Act includes a dispute between an employer and a single employee also and that the existence of other remedy does not bar them from raising industrial dispute as held by the Supreme Court in the case of Management of Ambala Central Coop. Bank Ltd. (supra). They have also contended that the word "Workmen" used in plural in the definition of "industrial dispute" by itself does not exclude the application of the Act to individual dispute because as per Sec. 13(2) of the General Clauses Act the words in plural include singular and vice versa. In support of this they have relied upon the judgment of the Supreme Court in the case of News Papers Ltd., (supra). In my view all the above contentions raised by the workmen have no bearing on the issue involved. The issue whether the dispute referred is an individual dispute and not an industrial dispute was framed not on the ground that the Irrigation Department of the Government of Goa, is not an "industry" or that the workmen are not "workman" under the Industrial Disputes Act 1947 or that workmen could not have raised the industrial dispute because they had alternate remedy. The issue No. 1 was framed by this Tribunal because the order of reference and the statement of claim and rejoinder filed by the workmen gave rise to the question as to whether the dispute referred is an individual dispute or an industrial dispute. This was because, obviously the dispute did not fall under Sec. 2A of the Industrial Disputes Act, 1947, and there was nothing in the order of reference or in the pleadings of the workmen which showed that the dispute was espoused by the union. Therefore by framing the issue No. 1 opportunity was given to the parties to prove whether the dispute referred is an individual dispute or industrial dispute, and if it was proved that the dispute referred is not an industrial dispute, the reference would not be maintainable.

In support of the issue No. 1 the workmen have examined Shri Sebastiao Araujo whereas the employer has examined Shri Hipolito D'Mello, who is working as Superintendent (Administration) in Public Works Department. It is well settled that the Government can make reference of only industrial dispute to the Tribunal for adjudication. Sec. 2(k) of the Industrial Disputes Act 1947 defines industrial dispute as follows:

> Sec. 2(k) "Industrial Dispute" means any dispute or difference between employer and employer or between employers and workmen or between workmen and workmen which is connected with employment or non-employment or the terms of employment or with conditions of labour of any person."

Thus the industrial dispute envisages a collective dispute. However, after the introduction of Sec. 2A to the Industrial Disputes Act, 1947, an individual dispute as contemplated under the said section is deemed to be an industrial dispute within the meaning of the Act. Section 2A contemplates individual dispute as an industrial dispute when a workman is discharged, dismissed, retrenched, or his services are terminated by the employer. The dispute involved in the present case is regarding the entitlement of the workman Shri Sebastiao Ticro to the pay of Rs. 216.66 (Escodos 1200) with effect from 1-2-1966 and Rs. 233.35 (Escodos 1400) with effect from the date of absorption and subsequent revision of pay scale as recommended by the pay commission from time to time and the entitlement of workmen Shri Manuel Sequeira and Shri Joao Fernandes to the scale of Rs. 216.65 (Escodos 1300) with effect from 1-2-1968 and subsequent revision of pay scale as recommended by the Pay Commission from time to time. Therefore the above dispute does not fall within the ambit and scope of Sec. 2A of the Industrial Disputes Act, 1947. This being the case the dispute raised by the workmen, which is an individual dispute, is not deemed

to be an industrial dispute, because it is not covered by Sec. 2A of the Industrial Disputes Act, 1947. It is therefore to be seen now whether the dispute referred is in fact an industrial dispute.

11. The employer has relied upon the decisions of the Supreme Court in the case of (1) Bombay Union of Journalists (supra) (2) workmen of Dharam Pal (Saugandhi) (supra) and (3) Shri Ranga Vilas Motors (P) Ltd., (supra). The gist of these decisions is that an individual dispute shall not become an industrial dispute unless it is sponsored by the union of the workmen or by a number of workmen. Same principles are laid down by the Supreme Court in the case of Western India Watch Co. Ltd., v/s The Western India Watch Company Workers Union reported in 1970 II LLJ 256. The Supreme Court has held that the individual dispute takes the character of an industrial dispute if it is espoused by the union or is supported by a substantial number of workmen. In the case of Central Provinces Transport Services Ltd., v/s Raghunath Gopal Patwardhan, reported in 1957 I LLJ, 27 the Supreme Court has held that the Scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in mottem to settle only disputes which involve the rights of the workmen as a class and that the dispute founding the individual right of a workman was not to be the object of an adjudication under the Act, when the same has not been taken up by the union or a number of workmen. It is therefore to be seen whether the dispute of the workmen in the present case is espoused or sponsored by the union of the workmen or by a substantial number of workmen.

12. Shri Sebastiao Araujo, the witness examined by the workmen stated in his deposition that he was working in Public Works Department at Work Division IV, Sub-division IV in the workshop and he was absorbed in post of Turner Grade I, after liberation. He stated that since he was absorbed in the post of Turner, he was entitled to the pay of Rs. 233.66p. and since he was given the said pay he made representation to the Labour Commissioner on 5-4-83 alongwith some other workers. He stated that therefore another representation was made to the Labour Commissioner made by the Turners and Fitters which he produced at Exb. W-1. He stated that besides them the Goa Government Employees Union also raised a dispute regarding fixation of their pay scale before the Labour Commissioner on 5-4-93. He stated that thereafter the union wrote further letters dated 13-12-83, 16-12-83, and 10-1-84 to the Labour Commissioner and subsequently withdrew from the conciliation proceedings and stopped representing the workmen. In his cross examination he admitted the minutes of the meeting Exb. E-1 held before the Labour Commissioner. He admitted that as per the said minutes the dispute before the Labour Commissioner was treated as withdrawn and the file was closed. He admitted that he and the other workmen were represented by the union prior to closing of the proceedings and not thereafter. The employer's witness Shri Hipolito D'Mello stated in his deposition that the workmen in the present reference had raised the dispute before the Labour Commissioner regarding fixation of their pay scale, and that the said dispute was raised individually and not through the union, and that subsequently the said dispute was withdrawn by them to enable them to approach the appropriate authority that is the Central Administrative Tribunal. He stated that thereafter the workmen did not raise any other dispute before any authority challenging the fixation of their pay scale. In his cross examination he stated that he is not aware whether the union had raised the dispute before the Asst. Labour Commissioner by letters dated 5-4-83, and 6-12-83. He also stated that he is not aware whether any dispute continued with the conciliation officer after 8-5-87 regarding the fixation of the pay scale of the workmen.

13. The workmen in their evidence have produced only two documents. The first document is the undated letter Exb. W-1 signed by 9 workers and the workmen in the present reference are amongst the said 9 workers. The endorsement on the said letter shows that it was received by the office of the Labour Commissioner on 16-9-1985. This letter shows that the workmen had made a representation to the Labour Commissioner on 5-4-83 regarding fixation of their pay scale and this letter was sent by way of reminder. The other document Exb. W-2 is the inter office correspondence on the representation made by the workmen to the Labour Commissioner regarding fixation of pay scale. The workmen have not produced any document to show that the dispute about fixation of their pay scale was raised by the Government Employees Union or any other union. The workmen in the cross examination of the employer's witness Shri Hipolito D'Mello only showed to him the letters dated 5-4-83 and 6-12-83 purported to have been written by the union to the Asst. Labour Commissioner on behalf of the workmen. The employer's witness did not admit these letters nor the workmen produced the said letters. Mere showing a document to the witness does not mean that it is produced. If a party is relying on any document he has to produce it in evidence and get it exhibited which was not done by the workmen in the present case. Therefore it cannot be known whether infact the letters were sent by the union as contended by the workmen and also the contents of the said letters are not known. The letters Exb. W-1 and W-2 do not prove that the dispute was raised by the Goa Employees Union on behalf of the workmen. The employer has produced the minutes of the meeting dated 8-5-87 at Exb. E-1. These minutes are admitted by the workmen in their evidence. There is no reference to the Government Employees Union or any other union of the workmen in the said minutes of the meeting. The minutes mention that on 8-5-87 when the discussions were held with the representatives of the employer the workmen in the present reference were present along with other two workers namely Mr. Manuel Viegas and Mr. Jose D'Souza. They were represented by one Mr. Estabislau Francisco Fernandes. It is not stated in the minutes that said Mr. Estabislau Francisco Fernandes was the representative of the union or that he was the

office bearer of any union. The minutes are signed by him alongwith the workmen. He has not described himself as the office bearer of any union. Therefore the only inference which can be drawn is that said Mr. Estabislau Fernandes represented the workmen in the capacity as their co-worker and not in the capacity as the office bearer of any union or on behalf of any union. Further the minutes of the meeting show that the issue was withdrawn by the workman and at their request the file was closed on 8-5-87. The employer's witness Shri Hipolito D'Mello in his cross examination did not admit that the dispute was continued with the conciliation officer after 8-5-87. No evidence has been produced by the workmen to show that the dispute continued even after it was closed on 8-5-87. The workman Shri Sebastiao Araujo has admitted in his cross examination that the dispute before the Labour Commissioner was treated as withdrawn and the file was closed. He has further stated that they were represented by the union prior to the closing of the proceedings of 8-5-87 and not thereafter. Infact as mentioned earlier no evidence whatsoever has been produced by the workmen to prove that their dispute was raised or espoused by the union nor they have been able to prove that they were represented by the union in the conciliation proceedings before the Labour Commissioner. Even if it is presumed for a moment that prior to 8-5-87 the dispute was raised by the union and they were represented by the union, it is of no help to the workmen because they themselves have admitted that on 8-5-87 the dispute was withdrawn and thereafter they were not represented by the union. It is not the case of the workmen that after the withdrawal of the dispute on 8-5-87 a fresh dispute was raised by the union on their behalf. From the suggestion put to the employer's witness in his cross examination, it appears that it is the case of the workmen that even after 8-5-87 the dispute continued with the conciliation officer. However, no evidence has been produced by the workmen in this respect. Even if it is presumed that the dispute continued after 8-5-87, the workmen themselves have admitted that the union stopped representing them, which means that after 8-5-87 the union had withdrawn its support to the dispute. The Supreme Court in the case of Bombay Union of Journalists (supra) has held that in ascertaining whether an individual dispute has acquired the character of an industrial dispute the test is whether at the date of the reference the dispute was taken up or sponsored by the union or by an appreciable number of workmen. The Bombay High Court also in the case of Novabharat, a Hindi daily, Nagpur v/s Nagpur Union of Working Journalists reported in 1990 Lab. IC 494 has held that the jurisdiction of the Industrial Tribunal to adjudicate the industrial dispute stems from and is sustained until it makes an award and the same becomes enforceable by the reference itself, which has been made on the basis of the industrial dispute existing or apprehended on the date of the reference and the jurisdiction to proceed in the matter is not in any way affected by the fact that subsequent to the date of reference the workmen or a substantial number of them who had originally sponsored the cause had later resolved or withdrawn from it. The High Court held that in such a case the reference does not become incompetent and invalid. Therefore the law laid down is that as on the date of the reference the espousal and support of the dispute by the union or by an appreciable number of workmen must be present for individual dispute to take the character of an individual dispute. In the present case the order of reference was made by the Government of Goa on 19-1-96. Therefore even if the contention of the workmen is accepted that earlier the dispute was espoused by the union, though infact it has been held by me that the workmen have failed to prove that their dispute was raised or espoused by the union, still the dispute referred would not be an industrial dispute because the workmen themselves have stated that after the dispute was withdrawn on 8-5-87 they were not represented by the union, which means that the union had withdrawn its support after 8-5-87. Therefore as on the date of the reference, that is, on 19-1-96 the espousal or support of the dispute by the union was not present. I would like to make it clear here that I have given my findings that as on 19-1-96, that is as on the date of the reference, there was no support to the dispute or espousal of the dispute by the union, and that therefore there was no industrial dispute, presuming the contention of the workmen as true that their dispute was earlier espoused by the union. Based on the evidence produced by the workmen and the employer, I have held that the workmen have failed to prove that the dispute was raised by the union namely the Goa Government Employees Union or for that matter by any other union on their behalf, at any time.

14. In the light of what is discussed above, I am of the view that the dispute referred by the Government is an individual dispute of the workmen and it does not partake the character of an industrial dispute as contemplated under Sec. 2(k) of the Industrial Disputes Act, 1947. This being the case, since the dispute does not fall within the provisions of Sec. 2A of the said Act, the reference made by the Government is bad in law, as under the Industrial law, the Government can make the reference of only an industrial dispute and not an individual dispute. I, therefore, hold that the dispute referred by the Government is not an industrial dispute and hence the reference is not maintainable. I, therefore answer the issue No. 1 in the affirmative.

In the circumstances, I pass the following order.

ORDER

It is hereby held that no industrial dispute existed at the time when the Government made the reference. It is therefore held that the reference made by the Government is bad in law and hence rejected.

No order as to cost. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 19-6-2002 in reference No. IT/15/93 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Angela Menezes, Joint Secretary (Labour)

Panaji, 27th June, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/15/93

Shri Michael Fernandes,
Rep. by Goa Trade & Commercial
Workers Union,
Velhos Building, 2nd Floor,
Panaji-Goa. ... Workman/Party I

V/s

M/s. Cia Commercial
Anglo Americana,
Rua de Ourem,
Panaji-Goa. ... Employer/Party II

Workman/Party I Represented by Adv. Shri R. Mangueshkar.

Employer/Party II-Ex-parte.

Panaji, dated: 10-6-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 21-12-1992 bearing No. 28/53/92-LAB referred the following dispute for adjudication by this Tribunal.

> "Whether the action of the management of M/s. Cia Commercial, Anglo Americana, Panaji-Goa, in terminating the services of Shri Michael Fernandes, Driver-cum-Salesman, with effect from 21-6-91 is legal and justified?
>
> If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/15/93 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party I (for short, "Workman") filed the statement of claim at Exb. 4. The facts of the case in brief as pleaded by the workman are that M/s Cosme Matias Menezes is a group of Companies having many sister concerns one of them being Employer/Party II M/s Cia Commercial, Anglo Americana. That he was appointed by M/s Cosme Matias Menezes as a driver cum salesman w.e.f. 23-7-79 and was posted at Margao depot. That his services were confirmed from 1-6-80 and as per the terms of the amendment letter he was liable to be transferred to one of the establishment of M/s Cosme Matias Menezes including the employer-Party II. That by letter dated 25-1-84 his services were transferred to the employer-Party II (for short, "employer") and he was informed that his salary stood revised w.e.f. 17-7-83 in line with the revision of M/s Cosme Matias Menezes scales in which he was placed. That the workman was further informed that his arrears would be paid in due course of time and that all the other service conditions remained the same. That on 13-6-90 the workman was issued a show cause notice by one Shri K. D'Souza of Cosme Matias Menezes alleging that there was some irregularity and unaccountability of some consumer products and by reply dated 14-6-90 the workman denied the allegations made against him. That inspite of the explanation given the employer issued a charge sheet dated 27-6-90 to the workman stating that the explanation given by him was found unsatisfactory. That in the charge sheet the workman was charged for theft, fraud and for acts subversive of discipline and good behaviour. That thereafter a domestic enquiry was conducted. That by letter dated 20-3-91 the employer informed the workman that they had gone through the findings of the Inquiry Officer wherein it was held that the charges levelled against him were proved and that they concurred with the said findings and further that taking into consideration the gravity of the misconduct and the past records of the workman they had decided to discharge the workman from service. That by letter dated 6-4-91 the workman informed the employer that since charges were not proved against him no action can be taken against him and the workman also reiterated that he had not committed theft, fraud or dishonesty as alleged. That the workman also submitted that the Inquiry Officer had acted in a bias manner and his findings were perverse. That the workman also submitted that his past service records were clean and if his services are terminated grave injustice and irreparable loss would be caused to him and his family members. That by letter dated 21-6-91 the employer informed the workman that there was no substance in his letter dated 6-4-91 and that they had decided to terminate his services on account of loss of trust and also on the ground that he was found guilty of the charges levelled against him. That on receipt of the said letter the workman wrote a letter to the employer requesting to withdraw the termination order and reinstate him with full back wages and continuity in service and since the employer did not exceed to the request the workman raised an industrial dispute and the conciliation proceedings held ended in a failure. The workman contended that the inquiry proceedings conducted against him was defective and invalid as the charges levelled against him were not according to the

service rules/certified standing orders or model standing orders. The workman also contended that the charges were not proved in the enquiry and the findings of the enquiry officer are perverse and biased. The workman contended that the termination of his services is illegal and unjustified and hence he is entitled to be reinstated in service with full back wages and continuity in service.

3. The employer filed the written statement at Exb. 5. The employer admitted that the workman was employed with them as a driver-cum-salesman. The employer stated that on 11-6-90 it was reported that the workman had inappropriated two tins of LIF of one kg each and one packet of Cerelac Wheat for which no invoice was raised and that further on 12-6-90 it was again reported that the workman had inappropriated one packet of Cerelac, one packet of Noodles and two packets of Tasters Choice of 250 gms for which invoices were not raised. The employer stated that a show cause notice was issued to the workman asking for his explanation and since the explanation given by him was not found satisfactory a charge sheet was issued to him charging him of theft, fraud or dishonesty in connection with the employer's business or property and committing acts subversive of discipline and good behaviour and that subsequently an enquiry was conducted in which he was given full opportunity to defend himself. The employer stated that the I. O. gave findings holding that the charges were proved against the workman and on receipt of the findings a show cause notice was issued to the workman as to why action should not be taken against him and on receipt of his explanation, considering the grave and serious charges which were found to be proved against him, he was discharged from service w. e. f. 21-6-91 by paying him one month's wages in lieu of notice. The employer stated that they were fully justified in discharging the workman from service. The employer denied that the enquiry was held against the workman not in a fair and proper manner or that the findings of the I. O. are perverse. The employer prayed that in case the enquiry is set aside they should be allowed to lead additional evidence before this Tribunal to prove charges against the workman. The employer denied that the workman is entitled to reinstatement in service with full back wages and continuity in service or to any other relief. The employer contended that the termination of service of the workman is legal and justified. The workman thereafter filed rejoinder at Exb. 6.

4. On the pleadings of the parties following issues were framed at Exb. 7.

1. Whether party I proves that the charges framed against him were not in accordance with the service rules/certified standing orders/model standing orders and hence the enquiry held against him is a nullify and invalid ?
2. Whether the charges of misconduct levelled against Party I are proved to the satisfaction of the Tribunal by acceptable evidence ?
3. Whether Party I proves that the termination of his services by Party II w.e.f. 21-6-91 is illegal and unjustified ?
4. Whether Party I is entitled to any relief ?
5. What Award ?

5. The issue Nos. 1 and 2 were treated as preliminary issues because the issue No. 1 pertained to the fairness of inquiry conducted against the workman and the issue No. 2 pertained to the misconduct alleged to have been committed by the workman. The employer was represented by Adv. Shri M. S. Bandodkar. After the issues were framed the case was fixed for evidence of the parties on preliminary issue Nos. 1 and 2. On 16-2-99 Adv. Shri Bandodkar, representing the employer submitted that he had given notice to the employer informing them of his desire to withdraw his appearance from the case. He produced the copy of the notice dated 8th February, 1999 given by him to the employer alongwith the application dated 16-2-99 praying that he may be permitted to withdraw his appearance from the case. The copy of the notice showed that it was hand delivered to the employer and the endorsement on the said notice showed that it was received by the Personal Manager of the employer. In the said notice Adv. Shri Bandodkar had informed the employer that the case was fixed on 16-2-99 and that he was going to withdraw his appearance on that date. Since proper notice was given by Adv. Shri Bandodkar to the employer the application filed by him was allowed and he was permitted to withdraw his appearance from the case on behalf of the employer. On 16-2-99 none was present on behalf of the employer and therefore the case was ordered to proceed ex-parte against the employer. Thereafter ex-parte evidence of the workman was recorded on the preliminary issues and by my findings dated 4-2-2000 it was held by me that the enquiry conducted against the workman is not fair, proper and valid. The issue No. 1 was therefore answered in the affirmative and the enquiry was set aside. Since it was held that the inquiry conducted against the workman is not fair and proper and valid and as such the enquiry was set aside, the question of deciding whether the misconduct is proved against the workman or not did not arise. The issue No. 2 was therefore answered accordingly. Thus the issue Nos. 1 and 2 stood disposed off.

6. My findings on the remaining issues are as follows:

Issue No. 3: In the affirmative

Issue No. 4: As per para 9 below.

Issue No. 5: As per order below.

REASONS

7. *Issue No. 3*: Even though the case was ordered to proceed ex-parte against the employer, still an opportunity was given to the employer to lead evidence before this Tribunal to prove the charges of misconduct

against the workman, because the employer had terminated the services of the workman on the ground that the workman had committed acts of misconduct as mentioned in the charge sheet dated 27-6-1990. However, none appeared on behalf of the employer and therefore the evidence of the employer on the merits of the case was closed on 9-3-2000. Thereafter the workman led evidence by examining himself. The workman stated that he was employed as a driver-cum-salesman in the year 1979 and he was confirmed in service w. e. f. 1-6-1980. He stated that as a salesman he was doing the work of billing, invoicing, checking the stock, and delivering the stock to the customers in van and that at the end of the week he was giving the account to his superior. He stated that at the time of termination of his service he was working at Mapusa Depot. He stated that he never committed any misconduct and hence the termination of his service is illegal and unjustified. He stated that he is entitled to reinstatement in service with full back wages.

8. The employment of the workman as driver-cum--salesman has not been disputed by the employer. The appointment letter dated 20-7-79 and the confirmation letter dated 5-6-80 issued to the workman are on record as Exb. W-1 and W-2 respectively. The evidence of the workman has gone unchallenged as the employer did not participate in the proceedings and allowed the case to proceed ex-parte against them in the circumstances stated above. The workman in his evidence has specifically stated that he had not committed any misconduct. In the present case the employer terminated the services of the workman because according to them the workman had committed certain acts of misconduct for which he was issued charge sheet dated 27-6-90 Exb. W-5, enquiry was held against him and the Inquiry Officer gave findings holding him guilty of the charges of misconduct. However, this Tribunal set aside the enquiry by findings dated 4-2-2000 and consequently the findings of the Inquiry Officer also stood set aside. The employer was afforded an opportunity to prove the charges of misconduct before this Tribunal after the enquiry was set aside. However, no evidence came to be led on behalf of the employer and in fact the employer did not participate in the proceedings and allowed the case to proceed ex-parte against them. Consequently there is no evidence before this Tribunal to prove the charges levelled against the workman in the charge sheet dated 27-6-90. The charges levelled against the workman in the charge sheet were to the effect that he had misappropriated one packet of Cerelac, one packet of Noodles and two packets of Tasters Choice 250 gms for which invoices were not raised. The services of the workman were terminated based on the above said charges. Now, since the charges themselves are not proved, the termination of service of the workman becomes illegal and unjustified. I therefore hold that the workman has succeeded in proving that the action of the employer in terminating his services w.e.f. 21-6-91 is illegal and unjustified. I, therefore answer the issue No. 3 in the affirmative.

9. *Issue No. 4:* This issue pertains to the relief to be granted to the workman. It is a settled law that once termination is held to be illegal and unjustified, the normal is that the workman is entitled to reinstatement in service with full back wages, unless there are valid reasons which do not warranty reinstatement or full back wages. In the present case I do not find any reason to deviate from this normal rule. There is no evidence on record to show that the past conduct of the workman was bad or that he is gainfully employed from the date of termination of his service. In my view therefore it is just and proper to award reinstatement to the workman with full back wages and continuity in service.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s Cia Commercial Anglo Americana, Panaji-Goa, in terminating the services of the workman Shri Michael Fernandes, Driver-cum-Salesman with effect from 21-6-91 is illegal and unjustified. The Workman Shri Michael Fernandes, Driver-cum-Salesman is ordered to be reinstated in service with full back wages and consequential benefits and continuity in service.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 1-7-2000 in reference No. IT/7/2000 given by the Industrial Tribunal, Panaji-Goa is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Sanjiv M. Gadkar, Under Secretary (Labour).

Panaji, 9th July, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/7/2000

Workmen rep. by the Marmagoa
Steel Employees Union,
C/o. House No. 447,
Macazana, Curtorim,
Salcete-Goa. ... Workman/Party I

V/s

M/s. Marmagoa Steel Ltd.,
280, Eclate, Curtorim,
Salcete-Goa.

Workman/Party-I absent.

Employer/Party-II represented by Adv. Shri M. S. Bandodkar.

Panaji, dated: 1-7-2002.

AWARD

In exercise of the powers conferred by sub-section (2) of Section 10 of the Industrial Disputes Act, 1947 the Government of Goa by order dated 5-1-2000 bearing No. CL/3-11/(40)/99/114 referred the following dispute for adjudication of this Tribunal.

1. Whether the action of the management of M/s. Marmagoa Steel Ltd., Curtorim, in declaring lock-out with effect from 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments, is legal and justified ?

2. Whether the action of the management of M/s. Marmagoa Steel Limited, in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work, is legal and justified?

3. If the answer to the point (1) and (2) above are in negative, what relief are the workmen entitled to ?

2. On receipt of the reference the case was registered under No. IT/7/2000 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workmen/ /Party-I (for short, 'union') filed statement of claim at Exb. 4. The facts of the case in brief as pleaded by the union are that it is the sole registered and recognised union of the workers employed in the factory of the employer/Party-II (for short, 'employer'). That the employer by order dated 2-8-99 dismissed the General Secretary, the Treasurer and the Vice President of the Union along with two other workmen who were the active supporters of the union. That the said dismissal was in violation of the statutory provisions and implied conditions of settlement and constituted unfair labour practice besides being illegal, unjustified and unwarranted. That the employer also dismissed other office bearers of the union and some other workers by way of unfair labour practice and victimisation. That the union had made various demands on the employer including the payment of bonus, reinstatement of dismissed workmen, implementation of safety measures, drew away with unfair labour practice etc. That the Union had also demanded to withdraw the illegal and unjustified lock-out and pay full wages to the workmen as they are refused entry in the factory premises. The union contended that the action of the management in declaring the lock-out w.e.f. 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments is illegal and unjustified. The union also contended that the action of the management of the employer in insisting upon the individual workmen to sign and give a request letter to the management as pre-condition to allow them to resume work is illegal and unjustified.

3. The employer filed written statement at Exb. 5. The employer stated that the reference made by the Government is not maintainable. The employer stated that the workers are not entitled to wages for the lock-out period as claimed by them as they have not physically worked on the principles of no work no pay. The employer stated that they were compelled to declare lock-out due to the situation created by the workers themselves. The employer stated that they were fully justified in insisting upon the signing of the letter by individual workman as a pre-condition to allow them to resume work because the workers created not only violent situation but also brought the working of the establishment to the grinding halt. The employer stated that due to the various misconducts committed by certain office bearers of the union and leaders the employer had to take disciplinary action against them. The employer stated that inspite of the various notices and representations the workers continued their violent activity and brought the entire operation virtually to a standstill. The employer stated that in the compelling situation the management declared lock-out in SMS department from 20-8-99, Rolling Mills from 22-8-99 and in QC department from 23-8-99. The employer stated that thereafter meetings were held with the Chief Minister of Goa and as per his wishes and request and the assurance from several workers that they will restore normalcy and work in disciplined manner and will give standard production, the management decided to lift the lock-out in all the said departments from 1-9-99 and accordingly lock-out was lifted. The employer stated that they were fully justified in seeking request letters from the workers while resuming their duties. The employer stated that inspite of the lifting of the lock-out the office bearers of the union did not allow the workers to resume their duties and subsequently a settlement was signed before the Dy. Labour Commissioner wherein the workers agreed to resume duties from 27-9-99. The employer stated that the union has not made out any case and as such the workers are not entitled to any relief. The Union thereafter filed rejoinder at Exb. 6.

4. On the pleadings of the parties following issues were framed Exb. 7.

1. Whether the Party I proves that the action of the Party II in declaring lock-out from 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments is illegal and unjustified ?

2. Whether the Party I proves that the action of the Party II in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is illegal and unjustified ?

3. Whether the Party II proves that the statement of claim filed by the Party I is not maintainable ?

4. Whether the workmen are entitled to any relief ?

5. What Award ?

5. My findings on the issues are as follows:

Issue No. 1 – In the negative.
Issue No. 2 – In the negative.
Issue No. 3 – In the negative.
Issue No. 4 – In the negative.
Issue No. 5 – As per order below.

REASONS

Issue No. 1 and 2: After the issues were framed the union was given sufficient opportunities to lead evidence in support of their case. However inspite of the opportunity given no evidence came to be led on behalf of the union and since none appeared on behalf of the union on 6-11-01, 21-1-02 and 7-3-02, the evidence of the union was closed and thereafter the case was fixed for employers evidence. However the employer also did not lead any evidence in the matter.

6. In the present case the reference of the dispute was made by the Government at the request of the union as they challenged the action of the employer in declaring lock-out w.e.f. 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments and they also challenged the action of the employer in insisting upon the individual workman to sign and give the request letter to the management as a pre-condition to allow them to resume work. According to the union the above said actions on the part of the employer were illegal and unjustified. It is a settled law that the party who challenges the legality of the order or the action taken by the employer the burden lies on that party to prove the legality of the said order or the action. The Allahabad High Court in the case of V.K. Raj Industies V/s Labour Court and others reported in 1981 (29) FLR 194 has held that the proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act is not applicable to the proceedings before the Industrial Court but the principles underlying the said Act are applicable. The High Court has held that it is a well settled law that if the party challenges the validity of an order the burden lies upon him to prove the illegality of the order and if no evidence is produced the party invoking the jurisdiction must fail. The High Court has further held that if the workman fails to appear or to file written statement or to produce evidence the dispute referred by the Government cannot be answered in favour of the workman and he would not be entitled to any relief. The Bombay Panaji Bench in the case of V.N.S. Engineering Services V/s. Industrial Tribunal, Goa, Daman and Diu reported in FJR Vol. 71 at page 393 has held that the obligation to lead evidence to establish an allegation is on the party making an allegation, the test being that he who does not lead evidence must fail. The Bombay High Court has further held that the provisions of Rule 10 B of the Industrial Disputes (C) Rules, 1957 clearly indicates that the party who raises an industrial dispute is bound to prove the contentions raised by him and the Industrial Tribunal or the Labour Court would be erring in placing the burden of proof on the other party to the dispute.

7. In the present case the dispute was raised by the union that the action of the employer in declaring lock-out and insisting upon the individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is illegal and unjustified. Therefore applying the law laid down by the Bombay High Court and the Allahabad High Court in the above referred cases the burden of proof was on the union to prove that the said action of the employer is illegal and unjustified. Sufficient opportunities were given to the union to lead evidence in the matter. However the union did not lead evidence and therefore evidence was closed in the circumstances stated earlier. Therefore there is no material before me to hold that the action of the employer in declaring lock-out w.e.f. 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments is illegal and unjustified. There is also no material before me to hold that the action of the employer in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is illegal and unjustified. In the absence of any evidence the above issues cannot be answered in favour of the Union. I therefore hold that the union has failed to prove that the action of the employer in declaring lock-out from 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC department is not legal and justified. I further hold that the union has also failed to prove that the action of the employer in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is not legal and justified. I, therefore answer the issue No. 1 and 2 in the negative.

8. *Issue No. 3:* In the written statement the employer took the defence that Mr. Agnelo Estebeiro is not the General Secretary of the Union as on 29-8-2000 because he was removed from the post of General Secretary and therefore he has no authority to file the statement of claim on behalf of the union and as such the statement of claim filed by the union is not maintainable. The burden was cast on the employer to prove the above fact. However though the opportunity was given to the employer to lead evidence in the matter, the employer did not lead any evidence. This being the case the employer has failed to discharge the burden cast on them to prove that the statement of claim filed by the union is not maintainable. I therefore hold that the employer has failed to prove that the statement of claim filed by the union is not maintainable and therefore I answer the issue No. 3 in the negative.

9. *Issue No. 4:* Since it has been held by me that the union has failed to prove that the action of the employer in declaring lock-out from 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments is not legal and justified and also that the union has failed to prove that the action of the employer in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is not legal and justified, the question of granting any relief to the union/workmen does not arise. In the circumstances I hold that the union/workmen are not entitled to any relief and therefore I answer the issue No. 4 in the negative.

Hence I pass the following order.

ORDER

It is hereby held that the action of the management of M/s. Marmagoa Steel Ltd., Curtorim, in declaring lock-out w.e.f. 20-8-99, 22-8-99 and 23-8-99 of SMS, RM and QC departments, is legal and justified. It is hereby further held that the action of the management of M/s. Marmagao Steel Ltd. in insisting upon individual workman to sign and give a request letter to the management as a pre-condition to allow them to resume work is legal and justified. It is hereby further held that the union/workmen are not entitled to any relief.

No order as to cost. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 28-6-2002 in reference No. IT/7/97 given by the Industrial Tribunal, Panaji-Goa is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Sanjiv M. Gadkar, Under Secretary (Labour).

Panaji, 9th July, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI
(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/7/97

Shri Dinesh S. Joshi,
Rep. by the President,
Goa Union of Journalists,
P. O. No. 331,
Panaji-Goa. ... Workman/Party I

V/s

M/s. Daily Sakal,
3rd Floor, Fatima Chambers,
A. B. Road,
Panaji-Goa. ... Employer/Party II

Party I/Workman - Represented by Adv. Shri A. Nigalye.

Party II/Employer - Represented by Adv. Shri P. A. Kamat.

Panaji, dated: 28-6-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 15th January, 1997 bearing No. IRM/CON/(86)/96/307 referred the following dispute for adjudication by this Tribunal.

> "Whether the action of the management of M/s. Sakal Papers Limited, Panaji-Goa, in terminating the services of Shri Dinesh S. Joshi, Reporter, with effect from 14th August, 1996, is legal and justified ?
>
> If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/7/97 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman--Party-I (for short, "Workman") filed his statement of claim at Exb. 5. The facts of the case in brief as pleaded by the workman are that he was appointed as a Reporter of the Employer-Party II (for short, "Employer") in the State of Goa by letter of appointment dated 31st December, 1993. That he was a full time reporter and representative of the employer. That his duties including collecting news, covering various official and non-official functions, investigative reporting, coverage of assembly proceedings, press conferences, crime reports and other allied activities. That he was performing his duties to the best of his ability, sincerity and devotion. That by letter dated 14th August, 1996 the Editor of the employer terminated his services with immediate effect. The workman contended that the employer has terminated his services without complying with the provisions of Sec. 25F of the Industrial Disputes Act, 1947 and hence his termination of service amounts to retrenchment. The workman contended that his services are not terminated on the ground of misconduct as no charge sheet was issued to him alleging acts of misconduct nor any departmental enquiry was held against him. The workman stated that the Editor of the employer had no authority to terminate his services and issue the order of termination. The workman contended that termination of his service by the employer is illegal and unjustified and therefore he is entitled to reinstatement in service, with full back wages.

3. The employer filed written statement at Exb. 6. The employer stated that the reference is not maintainable because the workman was engaged as a honorary correspondent and was paid a honorarium and as such he is not a workman as defined u/s 2(s) of the Industrial Disputes Act, 1947 and also because he is not a working journalist as defined under the provisions of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Misc. Provisions Act, 1955. The employer stated that the workman was one of the correspondent news collector engaged for the Taluka of Panaji on honorary basis and that he was engaged on trial basis from 1-1-1994 for a period of 6 months on honorarium of

Rs. 1000/- p.m. vide letter dated 31-12-93. The employer stated that during the period of his engagement his work was not found satisfactory and therefore he was issued various memos, oral warnings to improve his work but there was no improvement of the work of the workman. The employer stated that by letter dated 11-7-96 the workman was asked to submit his explanation for his various acts of misconduct mentioned in the said letter but the workman did not file any reply to the said memo and therefore another memo dated 31-7-96 was issued to him mentioning the acts of misconduct committed by him. The employer stated that the workman filed his explanation dated 7-8-96 which was not found satisfactory. The employer stated that the sub-editor of the employer had instructed the workman to attend the assembly session on 1-8-96 but the workman did not attend the said session and thus disobeyed the instructions of the sub-editor. The employer stated that thereafter the services of the workman were terminated by letter dated 14-8-96 and he was relieved from his responsibility as a correspondent with immediate effect. The employer denied that the termination of service of the workman amounts to retrenchment and further denied that the termination is in contravention of the provisions of Sec. 25F of the Industrial Disputes Act, 1947. The employer denied that its Editor who has signed and issued the order of termination has no authority to terminate the services of the workman. The employer stated that from 31st December, 1998 its temporary establishment in Goa has been closed down and all the correspondents/news collectors have been dis-engaged/discontinued from that date. The employer denied that its action in terminating the services of the workman is illegal and unjustified. The employer denied that the workman is entitled to any relief as claimed by him. The workman thereafter filed rejoinder at Exb. 6.

4. On the pleadings of the parties, issues were framed at Exb. 7 and thereafter the case was fixed for the evidence of the workman. The deposition of the workman was partly recorded and the case was fixed on 21-6-2002 for recording the further examination in chief of the workman. On this date Adv. Shri Nigalye, representing the workman and Adv. P. A. Kamat, representing the employer submitted that both the parties have settled the dispute amicably and they filed the terms of settlement dated 21-6-82 at Exb. 15. Both the parties prayed that consent award be passed in terms of the said settlement. I have gone through the terms of the said settlement and I am satisfied that the said terms are certainly in the interest of the workman. I, therefore accept the submissions made by the parties and pass the consent award in terms of the settlement dated 21-6-2002 at Exb. 15.

ORDER

1. That towards full and final settlement of the claim of the workman in IT case No. 7/97 and LCC/case No. 16/98 the Employer (Party II) has paid to the Party I, today Rs. 75,000/- (Rupees Seventy Five Thousand only) by Pay Order dated 20-6-2002 bearing No. 000138 drawn on The Goa Urban Co-operative Bank Ltd., Panaji, Goa. The (Party I) Workman declares that he has no claim whatsoever against the employer and the IT case No. 7/97 and LCC case No. 16/98 stand amicably settled.

2. The Workman/Party I shall not be entitled for reinstatement and any other amount and entire claim stands settled.

3. In view of this settlement the IT case No. 7/97 and LCC case No. 16/98 stand deposed off on above terms. Parties pray that consent award be passed on the above terms.

Pronounced in the Open Court.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 14-6-2002 in reference No. IT/6/89 given by the Industrial Tribunal, Panaji-Goa is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Sanjiv M. Gadkar, Under Secretary (Labour).

Panaji, 9th July, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/6/89

Workmen Rep. by
Goa Trade & Commercial
Workers Union,
Panaji-Goa. ... Workmen/Party I

V/s

M/s. Goa Bottling Co. Pvt. Ltd.,
Arlem,
Salcete-Goa. ... Employer/Party II

Workmen/Party I - Represented by Adv. Shri R. Mangueshkar.

Employer/Party II - Represented by Adv. Shri B. G. Kamat.

Panaji, dated: 14-6-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 9th January, 1989 bearing No. 28/61/88-ILD referred the following dispute for adjudication by this Tribunal.

"Whether the action of the management of M/s. Goa Bottling Company Private Limited and their contender Shri Prakash Naik in terms of services of the following workmen with effect from 27-10-87 is legal and justified ?

1. Shri Vinayak Naik
2. Shri Ramchandra Naik
3. Shri Shamba Surlekar
4. Shri Uttam Naik
5. Shri Francis Goankar
6. Shri Pradeep Naik
7. Shri Ramakant Naik
8. Ms. Rosaline Cardozo
9. Ms. Pedrine Colaco
10. Ms. Ruzatte Goankar

If not, to what relief the workmen are entitled to ?"

2. On receipt of the reference a case was registered under No. IT/6/89 and registered A/D notice was issued to the parties. In pursuance to the said notice, the parties put in their appearance. Before the statement of claim was filed by the Workmen-Party I (for short, "Workmen") the Government of Goa by order dated 22-2-90 amended the reference and as per the said amendment the words "and their contender Shri Prakash Naik" appearing in the schedule of reference were omitted. In view of the said amendment the schedule of reference read as follows:

"Whether the action of the management of M/s. Goa Bottling Company Private Limited in terms of services of the following workmen with effect from 27-10-87, is legal and justified ?

1. Shri Vinayak Naik
2. Shri Ramchandra Naik
3. Shri Shamba Surlekar
4. Shri Uttam Naik
5. Shri Francis Goankar
6. Shri Pradeep Naik
7. Shri Ramakant Naik
8. Ms. Rosaline Cardozo
9. Ms. Pedrine Colaco
10. Ms. Ruzatte Goankar

If not, to what relief the workmen are entitled ?"

3. The workmen filed statement of claim at Exb. 4. The facts of the case in brief as pleaded by the workmen are that the Employer-Party II (for short, 'employer') manufactures soft drinks like Limca, Thums Up, Rim-Zim, Gold Spot, Maaza, Bisleri Soda, having wide demand in Goa and outside and that they have many depots in and outside Goa. That about 30 to 40 trucks, each truck carrying about 500 to 600 boxes are loaded and unloaded daily. That the workmen were employed by the Employer and they were as loaders/unloaders. That apart from them the employer engaged other 33 workers as loaders/unloaders through one contractor known as Prakash Naik, whose services were terminated by the employer and their dispute was registered as reference case No. IT/32/89 and that the said dispute is pending before this Tribunal for adjudication. That the loaders/unloaders besides doing the work of loading and unloading of boxes were also doing the work of accumulating filled bottles and arranging them in the boxes/racks cleaning and sorting out the damaged bottles, sometimes accompanying the trucks to various depots/destinations for loading/unloading purposes. That these workers were paid pathetic wages of Rs. 15 per day and no other benefits were given to them whereas some loaders/unloaders who were directly employed by the employer were paid Rs. 1200/- p.m. and they also enjoy various other facilities and benefits but the workmen in the present reference were denied these wages and benefits though they were doing the same type of job like other loaders/unloaders. That the workmen therefore decided to become the members of the union and the employer on learning this fact refused employment to the workmen w.e.f. 27-10-87 and engaged new workers in their place. That the workmen raised industrial dispute which ended in failure as the employer failed to attend the conciliation proceedings inspite of the notice issued by the Asst. Labour Commissioner. The workmen contended that at the time when their services were terminated no retrenchment compensation was paid to them. The workmen claimed that since the termination of their service is illegal and unjustified they are entitled to reinstatement in service with full back wages.

4. The employer filed written statement at Exb. 5. The employer stated that the Jr. Secretary of the Union had no authority to sign or file the written statement on behalf of the workmen and therefore the claim statement is liable to be rejected. The employer denied that they have any depots in Goa or that 30 to 40 trucks are loaded/unloaded daily. The employer denied that the workmen had put in several years of service. The employer stated that on account of temporary increase in work, six of the workmen were engaged as loaders/unloaders for the period November, 1986 to January, 1987 and all the workmen were engaged again for temporary period from March, 1987 to 9th June, 1987 and thereafter from August, 1987 to 26th October, 1987. The employer stated that none of the workmen were under obligation to come for work every day or to work for full day and during the intermittent temporary employment from November, 1986 to 26th October, 1987 the total attendance of the workmen was between 137 and half days minimum and 204 days maximum. The employer stated that the relationship of the workmen with the employer was purely of temporary nature and they always comply with the provisions of over time working weekly offs or compensatory offs. The employer denied that some loaders/unloaders were paid Rs. 1200/- per month by them. The employer denied that the workmen were refused employment from 27-10-87. The employer stated that the termination of appointment of the workmen from 27-10-87 was on account of completion of temporary work for which they were engaged from 1st August, 1987. The employer denied that the termination was preceded by charter of demands or that new hands were engaged in place of the said workmen. The employer denied that termination of service of the workmen is illegal or unjustified or that they are entitled to any relief as claimed by them. The employer stated that the reference is liable to be rejected. The workmen thereafter filed rejoinder at Exb. 6.

5. On the pleadings of the parties, following issues were framed at Exb. 7.

1. Whether the management of M/s. Goa Bottling Co. Pvt. Ltd., prove that 10 workmen under Government reference were temporary workmen engaged as loaders/unloaders between November, 1986 to October, 1987 as contended in para. 5 of the written statement ?
2. Whether the company proves that during the temporary employment of the workmen whenever work was available on account of temporary increase in the orders was made available to them and whether the relationship between the company and the 10 workmen was of temporary nature as contended in para. 6 of the written statement ?
3. If so, whether the action of the company is not engaging the 10 workmen from 26-10-87 amounts to retrenchment within the meaning of the term u/s 25F of the Industrial Disputes Act ?
4. If the action of the Company amounts to retrenchment, whether the provisions of the relevant sections were duly complied with by the management before retrenching the workmen and whether the action of terminating the services w.e.f. 27-10-87 is just and legal ?
5. If not, to what reliefs are the 10 workmen entitled to in the circumstances of the case ?

6. My findings on the issues are as follows:

Issue No. 1: In the affirmative.

Issue No. 2: In the affirmative.

Issue No. 3: Termination amounts to retrenchment within the meaning of the term u/s 2(00) of the Industrial Disputes Act, 1947.

Issue No. 4: The provisions prescribing pro--cedure for retrenchment did not apply to the workmen and hence the question of complying with the said provisions did not arise. The termination of service of the workmen w.e.f. 27-10-87 is legal and justified.

Issue No. 5: Workmen are not entitled to any relief.

REASONS

7. *Issue Nos. 1, 2, 3 and 4:* All these issues are taken up together because they are interrelated. The workmen as well as the employer have filed written arguments in support of their respective contentions, and I have considered the said arguments. The case of the workmen in short is that they were directly employed by the employer and they were doing the work of loading and unloading besides doing other work. It is their case that the employer terminated their services w.e.f. 27-10-87 because the employer learnt that they had decided to unionise themselves and become the members of the union. It is their case that each of them had completed more than 240 days in service before termination of their service and since the employer did not comply with Sec. 25F of the Industrial Disputes Act, 1947, the termination of their service is illegal and unjustified. The case of the employer on the other hand is that the workmen were employed intermittently as temporary workers because there was temporary increase in work and that they were employed during the period November, 1986 to October, 1987. It is the case of the employer that after 27-10-87 they were not engaged because there was no work for them and since they had not completed 240 days in service, the question of complying with the provisions of Sec. 25F of the Industrial Disputes Act, 1947 did not arise. It is also the case of the employer that Sec. 25F of the Act is not applicable because the services of the workmen stood terminated on account of the completion of the temporary work for which they were engaged. The Employer has relied upon the judgment of the Karnataka High Court in the case of Karur Vysya Bank employees Union v/s Central Government Industrial Tribunal, Bangalore reported in 1989 FLR Vol.(59) 157 in support of their contention that Sec. 25F of the Industrial Disputes Act, 1947 is not applicable to the workmen.

8. In the instant case the workmen as well as the employer have led evidence. The workmen have examined Shri Vinayak Naik and Smt. Rosaline Cardoz whereas the employer have examined their General Manager Shri Datta Borkar. Shri Vinayak Naik in his deposition has stated that he joined the services of the employer as a helper in 1985 and that the other two workers namely Smt. Rosaline Cardoz and Pedrinho Colaco had joined as helpers prior to 1985 and the remaining seven workmen who had joined are his juniors. Smt. Rosaline Cardoz has stated in her deposition that she joined the services of the employer as a helper in the year 1984 and the remaining nine workmen joined as helpers after her joining the services. Both these workmen have not led any evidence to prove that they were employed from April, 1985 and 1984 respectively. Smt. Rosaline Cardoz has stated that the workmen were not given appointment letter nor ESI card. Neither Shri Vinayak Naik nor Smt. Rosaline Cardoz have stated as to when the other workmen joined the services of the employer. The employer had stated that the workmen were engaged during the period November, 1986 to 26th October, 1987 and in support of this they have produced the daily payment sheets for the period November, 1986 to October, 1987 at Exb. 15. Further the workman Shri Vinayak Naik stated in his deposition that the employer was not maintaining their attendance register but they were given cards which were being punched and the said cards were being collected by the employer at the end of the month. These cards were the relevant documents. However, the workmen did not rely upon the said cards. The workmen had filed their list of documents on 15-6-1990. These cards were not listed in the list of documents. The employer's witness Shri Datta

Parab stated in his cross examination that the employer does not preserve the attendance cards of the temporary workers and therefore he cannot produce them. I have no reason to disbelieve this statement of the employer's witness. The workmen ought to have been diligent enough and ought to have relied upon the said attendance cards and sought their production by the employer at the earliest stage, that is, at the stage when the list of documents was filed and not about 5 years after their services were terminated, and that too in the course of the evidence of the employer. Therefore in the absence of any evidence from the workmen the statement of the workman Shri Vinayak Naik that he was employed from April, 1985 and that of the workman Smt. Rosaline Cardoz that she was employed from the year 1984 cannot be accepted. There is no evidence from the workmen as to from which date the other workmen were employed with the employer.

9. The workman Shri Vinayak Naik and Smt. Rosaline Cardoz have stated in their evidence that the workmen including them were employed as helpers and that they never did the work of loading and unloading. This statement of theirs is contrary to the pleadings made by them in the claim statement. In the claim statement the workmen have stated that they were employed as loaders/unloaders directly by the employer and that besides the work of loading/unloading the boxes in the trucks they were also doing other work in the factory. Therefore there is an admission on the part of workmen themselves that they were employed as loaders/ /unloaders. The employer's case is that the workmen were employed as temporary workers because there was increase in the work. The employer have produced their satisfied standing orders at Exb. 16. Clause 5(iii) of the said standing orders defines "Temporary employee", as an employee who has been engaged for a limited period of work which is of an essentially temporary nature or who is engaged temporarily as an additional employee in connection with temporary increase in work of a permanent nature and includes an employee who is engaged in a temporary vacancy of a permanent employee or a probationer absent on leave. Thus it is the case of the employer that the workmen fell within the definition of "Temporary employee" as they were employed on temporary basis because there was increase in work. The employer's witness Shri Datta Borkar has stated that whenever there was increase in the work load the employer used to engage temporary workers on daily wages and the payment was made to them every week. He has produced the daily payment sheets at Exb. 15. These payment sheets show the period for which the temporary workers were employed and the amount of the daily wages paid to them every week. The names of the workmen in the present reference appear in the said payment sheets. In the absence of any other evidence from the workmen the daily payment sheets produced by the employer at Exb. 15 are liable to be accepted. These payment sheets show that the workmen were employed as temporary workers. Besides, the workman Shri Vinayak Naik has stated in his deposition that the workmen including him were being paid Rs. 14/- per day as wages and were not getting other facilities whereas the permanent workers were paid Rs. 1000/- to Rs. 1200/- alongwith other facilities and further that attendance register was maintained for the permanent workers and they are the members of the union whereas the workmen are not. In his cross examination he has stated that deductions were made from his wages whenever he remained absent. The workman Smt. Rosaline Cardoz stated in her cross examination that she was not paid for her absence. The above evidence shows that the workmen were employed by the employer on temporary basis, that is, as temporary workers.

10. The workmen in their written arguments have submitted that the temporary workman also falls within the definition of "workman" and therefore the provisions of the Industrial Disputes Act, 1947 are applicable to them. Infact the employer has not disputed that the workmen do not fall within the definition of "Workman" as defined under the Industrial Disputes Act, 1947. The workmen have relied upon the Judgments of various High Courts namely that of Kerala High Court in the case of Kerala Private Motors and Mechanic Workers Federation v/s State of Kerala and another reported in 1993 II CLR 943; that of the Madras High Court in the case of E. Ellu Malai v/s Management of Simplex Concrete Tiles (India) Ltd., reported in 1970 Lab. IC 1469 and in the case of P. Joseph v/s The Management of Gopal Textile Mills reported in 1975 I LLJ 136; that of the Calcutta High Court in the case of Tapan Kumar Jana v/s Calcutta Telephone and others reported in 1988 II LLJ 382 and that of the Supreme Court in the case of Digwedih Colliary v/s their Workmen reported in 1965 II LLJ 188. The gist of the above decisions is that to decide whether a person is a "Workman" or not, permanent employment is not the sole criteria, and even a temporary/badli worker or an apprentice would also fall within the meaning "Workman" as defined under the Industrial Disputes Act, 1947. The Kerala High Court in the case of Private Motors and Mechanic Workers Federation (supra) has held that every person employed in the establishment is a workman as defined in Sec. 2(s) of the Industrial Disputes Act, 1947 whether he is temporary or permanent or probationer. Therefore the workmen in the present reference are "workman" within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947 and the provisions of the Industrial Disputes Act, 1947 applied to them.

11. The contention of the workmen is that termination of their service amounts to "Retrenchment" and since the employer did not comply with the provisions of Sec. 25F of the Industrial Disputes Act, 1947, the termination is illegal and unjustified. Sec. 2(00) of the Industrial Disputes Act, 1947 defines "retrenchment" as follows.

(00) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include;

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health"

The contention of the employer is that the services of the workmen were not terminated but their services stood terminated automatically in terms of the contract of temporary employment from 1st August, 1987, and that therefore there being no retrenchment, the provisions of Sec. 25F of the Industrial Disputes Act, 1947 are not applicable to the workmen. In the present case the services of the workmen were not terminated as a matter of punishment by way of disciplinary action. Admittedly no charge sheet was issued to them. The employer has tried to contend that the case of the workmen falls within the exceptions to Sec. 2(00) of the Act namely clause (bb) because according to the employer the service of the workmen stood automatically terminated from 27th October, 1987 in terms of the contract of temporary employment from 1st August, 1987. The employer has not produced any documentary evidence or any other evidence to prove that the employment of the workmen was for a specified period, that is, from 1st August, 1987 to 26th October, 1987. The daily payment sheets Exb. 15 do not prove the contract of temporary employment from 1st August, 1987. The said paysheets only prove the number of days the workmen worked with the employer. Therefore I do not accept the contention of the employer that the services of the workmen stood terminated automatically in terms of the contract of temporary employment from 1st August, 1987 and that therefore the case of the workmen fall within the exception to Sec. 2(00) of the Industrial Disputes Act, 1947 and that therefore the provisions of Sec. 25F of the Act are not applicable to them. In my view the termination of service of the workmen from 27-10-87 amounts to retrenchment. Now it is to be seen whether the termination is illegal and unjustified for not complying with the provisions of Sec. 25F of the Industrial Disputes Act, 1947. Sec. 25F of the Act lays down that the services of a workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of such notice and has been paid compensation at the rate of 15 days average wages per each completed year of continuous service or any part thereof in excess of six months. The Supreme Court in the case of M/s. Avon Services Production Agency Pvt. Ltd., v/s Industrial Tribunal, Hariyana and Others reported in AIR 1979 SC 170 has held that giving notice and payment of compensation is a condition precedent in the case of retrenchment and failure to comply with the provisions prescribing the condition precedent for valid retrenchment in Sec. 25F renders the order of retrenchment invalid and in-operative.

12. The provisions of Sec. 25F of the Act are applicable only to those workmen who have been in continuous service for not less than one year. Sec. 25B(2) of the Industrial Disputes Act, 1947 defines "Continuos Service". It states that a person shall be deemed to be in continuous service under an employer for a period of one year, if the workman during the period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine and 240 days in any other case. In the present case admittedly the workmen were not employed below ground in a mine. Therefore it is to be seen whether the workmen had worked for 240 days during the period of 12 calendar months prior to the date of termination of service i.e. prior to 27-10-87. The employer has produced the daily payment sheets at Exb. 15. These payment sheets are in respect of the payments made to the temporary workers for the days they worked. The said daily payment sheets are for the period from 3rd November, 1986 to 26th October, 1987. The workmen have not produced any document in respect of their employment with the employer, nor any document to prove that they worked for 240 days or more with the employer prior to the date of termination of their service. The workmen have not challenged the daily payment sheets Exb. 15 produced by the employer. Therefore in the absence of any evidence from the workmen the daily payment sheets Exb. 15 produced by the employer are liable to be accepted. The said daily payment sheets show that none of the workmen worked with the employer in the month of February, 1987 and July, 1987. Further the said daily payment sheets show that during the period 3rd November, 1986 to 26th October, 1987 the workmen Shri Vinayak Naik worked for 203 & 1/2 days; Shri Ramchandra Naik worked for 203 days; Shri Shamba Surlekar worked for 151 days; Shri Uttam Naik worked for 160 days; Shri Francis Gaonkar worked for 137 & 1/2 days; Shri Pradeep Naik worked for 195 days; Shri Ramakant Naik worked for 139 days; Smt. Rosaline Cardoz worked for 204 days; Smt. Pedrinha Colaco worked for 190 days and Smt. Ruzatte Goankar worked for 211 days. Thus it can be seen that none of the workmen worked for minimum 240 days. This being the case the provisions of Sec. 25F of the Industrial Disputes Act, 1947 did not apply to the workmen and hence the non compliance of the provisions of the said section did not make the termination illegal and unjustified. I, therefore hold that the termination of service of the workmen w.e.f. 27-10-87 by the employer is legal and justified.

13. The workmen have contention that subsequent to the termination of their service the employer has employed more workers. The workman Smt. Rosaline Cardoz has stated in her evidence that after the workmen were removed, the employer employed 10 new workers. She has given the names of the said new workers. The employer's witness Shri Datta Parab stated in his

evidence that the employer employed 15 permanent workers after termination of service of the workmen. In the cross examination he produced the letters of appointment issued to the 15 workers at Exb. 17 colly. These letters of appointment show that the said 15 workers were appointed in November, 1989 and they were appointed as the factory workers. These 15 new workers included those workers whose names are given by Smt. Rosaline Cardoz in her evidence. Further the terms and conditions of the said appointment letters show that they were appointed as permanent workers and they were not appointed as loaders/unloaders. Therefore there is no violation of Sec. 25H of the Industrial Disputes Act, 1947 on the part of the employer. In the circumstances, I answer the issue Nos. 1 and 2 in the affirmative. As regards the issue No. 3, I hold that the termination amounts to retrenchment within the meaning of Sec. 2(oo) of the Industrial Disputes Act, 1947. As regards the issue No. 4, I hold that the provisions prescribing procedure for retrenchment did not apply to the workmen and hence the question of complying with the said provisions did not arise. I further hold that the termination of service of the workmen w.e.f. 27-10-87 is legal and justified. I, therefore answer the issue No. 4 accordingly.

14. *Issue No. 5:* while deciding the issue Nos. 1 to 4, I have held that the termination of service of the workmen by the employer w.e.f. 27-10-87 is legal and justified. This being the case the question of granting any relief to the workmen does not arise. I, therefore hold that the workmen are not entitled to any relief and answer the issue No. 5 accordingly.

In the circumstances, I pass the following order.

Order

It is hereby held that the action of the management of M/s. Goa Bottling Company Pvt. Ltd., in terminating the services of the workmen 1. Shri Vinayak Naik, 2. Shri Ramchandra Naik, 3. Shri Shamba Surlekar, 4. Shri Uttam Naik, 5. Shri Francis Goankar, 6. Shri Pradeep Naik, 7. Shri Ramakant Naik, 8. Ms. Rosaline Cadozo, 9. Ms. Pedrine Colaco, 10. Ms. Ruzatte Goankar with effect from 27-10-87, is legal and justified. It is hereby further held that the above workmen are not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

No. 28/7/2001-LAB

The following Award dated 18-7-2002 in Reference No. R-IT/9/78 given by the Industrial Tribunal, Panaji--Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Angela Menezes, Joint Secretary (Labour).

Panaji, 21st August, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. R–IT/9/78

Shri Sakharam M. Sawant,
The Secretary, Goa Trade & Commercial
Workers Union,
Velho's Building, 2nd Floor,
Panaji-Goa. — Workman/Party I

V/s.

M/s. Madras Rubber Factory Ltd.,
Ponda-Goa. — Employer/Party II

Workman/Party I - Represented by Shri Subhas Naik.

Employer/Party II-Represented by Adv. Shri G. K. Sardessai.

Panaji, dated: 18-7-2002

AWARD

In exercise of the powers conferred by clause (d) of sub.–section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 17th November, 1977 bearing No. IRM/CON(16)/77/IT-17/77 referred the following dispute for adjudication by this Tribunal.

> "Whether the action of the management of M/s. Madras Rubber Factory Ltd., Tisk-Usgao, Ponda, in terminating the services of Shri Sakharam M. Sawant with effect from 30-10-76 is legal and justified?
>
> To what relief, if any, is the workman entitled ?"

2. On receipt of the reference a case was registered under No. IT/9/78 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party I (for short, "Workman") filed his statement of claim in support of his contention that termination of his service is illegal and unjustified. The facts of the case as pleaded by the workman are that by letter dated 28-6-74 he was appointed by the Employer-Party II (for short, "Employer") as an operative trainee on stipend of Rs. 5/- per day for the first year and Rs. 6/- per day for the second year plus incentive allowance. That the workman worked as an apprentice for two years and thereafter he was appointed on probation vide probationary appointment letter dated 25-5-76. That the workman had completed his apprenticeship period of two years before he was appointed on probation probation from 1-5-1976. That he was appointed as

operator in the laboratory where he worked as a M. R. C. Lab. Operator, in Group II, and thereafter in the absence of Chemical Compounder he was shifted to the Chemical Compounding Department to work as Chemical Compounder, in Group I. That instead of confirming him he was terminated on completion of his six months probation period by letter dated 30-10-1976 which was delivered to him on 1-11-76. That the said decision of the employer had come as a result of two warning letters dated 18-8-76 and 16-10-76 served on him. That the workmen made representation that the warnings were not called for as he was not at all implicated. That the said warning letters showed that preliminary enquiry was necessary to establish the guilt of the workman. The workman contended that the warnings were given to him on flimsy ground and denial of confirmation to him after he had worked as apprentice for two years and as a probationer for six months, is malafide and vindictive. The workmen contended that the incharge of the laboratory was prejudiced against him and he had wrongly implicated him in the complaint dated 18-8-76. The workman contended that a probationer cannot be terminated without enquiry if the management alleges misconduct. The workman claimed that he is entitled to reinstatement in service with full back wages.

3. The employer filed written statement denying the contentions made by the workmen in the claim statement. The employer admitted that the workman was appointed as apprentice w.e.f. 15-5-74 vide letter dated 28-6-74 for a period of 2 years. The employer stated that after the expiry of the training period the workman was appointed on probation for a period of six months and as per the letter appointing him on probation his probationary period could be extended at the discretion of the employer and if at the end of the probationary period he was not issued confirmation order he would continue to be on probation. The employer stated that on the last date of the probationary period by letter dated 30-10-76. The employer informed the workman that his services were not found satisfactory during the probation period and as such the employer did not desire to extend the period of probation and/or confirm him. The employer stated that the assessment of the performance of the workman was based on the incidents which took place between 1-5-76 to 30-10-76. The employer stated that a memo dated 18-8-76 was issued to the workman based on the report of the supervisor concerning the incident which had taken place on 12-8-76. The employer denied that the workman was due for confirmation automatically on 1-11-76. The employer denied that the warning letters dated 18-8-76 and 16-10-76 were given to the workman without any investigation or hearing or that they were required to make investigation and give hearing before issuing the warnings. The employer stated that preliminary enquiry was conducted into the incidents by the officers of the employer and based on the preliminary investigations, the warning letters were issued to the workman in accordance with the certified standing orders. The employer denied that the workman was wrongly implicated in the complaint dated 18-8-76 and that false warning letters were produced during the conciliation proceedings with a view to spoil the service record of the workman. The employer denied that the workman was victimised or removed from service on completion of his probationary period for malafied reasons. The employer stated that the workman cannot be allowed to contend that there was no reason for the employer to terminate his services, because if it is allowed to be done it would amount to allowing the workman to sit in the judgment over his own performance and invest in him the functions of the managerial cadre to assess the performance of a probationer. The employer denied that the workman is entitled to permanent employment as claimed by him. The employer denied that the workman is entitled to any relief as claimed by him. The workman thereafter filed rejoinder controverting the pleadings made by the employer in the written statement.

4. On the pleadings of the parties, following issues were framed.

1. Does the Opponent prove that the services of Party I have been terminated legally and for good reasons ?
2. Does the Party I prove that the termination is malafide and amounts to victimisation and unfair labour practice.
3. Does Party I prove that he has not been able to find alternative employment ?
4. Do the Employer/Party II prove that the reference is bad in law and not maintainable ?

5. *The issue No. 4:* which was on the maintainability of the reference was disposed off by the Tribunal by order dated 10-4-1980 holding that the reference was correctly made and it was maintainable. Thereafter the parties led evidence and this Tribunal passed the Award dated 9-9-88 holding that termination of service of the workman w. e. f. 30-10-1976 is not legal and justified. By the said Award the Tribunal did not grant reinstatement to the workman but instead of reinstatement directed the employer to pay Rs. 6500/- to the workman by way of compensation. In the said Award the Tribunal referred to the order passed by this Tribunal disposing off the issues regarding the maintainability of the reference and held that the said order was wrongly mentioned as dated 1-4-80 when infact it is dated 10-4-80. The said Award dated 9-9-88 was challenged by the workman as well as the employer before the Bombay High Court, Panaji Bench, Goa, in two separate Writ Petitions being Writ Petition No. 75/89 and 203/89. By consent between the workman and the employer the Hon'ble High Court set aside the Award dated 9-9-88 and remanded the matter to this Tribunal with a direction to hear the matter afresh on the basis of the existing evidence on record. Accordingly notice was issued to the parties on receipt of the Writ from the Hon'ble High Court. Shri Subhas Naik appeared on behalf of the workman and Adv. Shri

G. K. Sardessai appeared on behalf of the employer, and they were heard on the merits of the case.

6. My findings on the issues are as follows:

Issue No. 1 : In the affirmative.

Issue No. 2 : In the negative.

Issue No. 3 : Does not arise.

7. *Issue No. 1 and 2*: Shri Subhas Naik, representing the workman submitted that the workman was initially employed with the employer as an apprentice and his training period was from 15-5-74 to 14-5-76 that is, for a period of two years. He submitted that thereafter he was appointed on probation for a period of six months vide letter dated 25-5-76. He submitted that the employer terminated the services of the workman vide letter dated 30-10-76. He submitted that the services of the workman were terminated during the probation period because the period of probation is to be counted from 25-5-76, that is, from the date on which the probationary letter was issued and not from the date the probationary period was made effective i. e. from 1-5-76. He submitted that termination of service of the workman was on account of misconduct as can be seen from the letter dated 18-8-76 Exb. E- 1 and the letter dated 16-10-76 Exb. W-4 and therefore the employer was bound to hold an enquiry against the workman prior to termination of his service. He submitted that the workman had completed 240 days of service because his service period is liable to be counted from the date he was appointed as an apprentice as he was not appointed as an apprentice under the Apprenticeship Act and as such he was workman under the Industrial Disputes Act, 1947 and this being the case the employer had to comply with the provisions of Sec. 25F of the Industrial Disputes Act, 1947. He submitted that in view of the submissions made, the termination of service of the workman is illegal and unjustified. He submitted that termination of service of the workman is also by way of victimisation, malafide and unfair labour practice because the employer wanted to deny the workman confirmation or permanency in service on completion of the probationary period. In support of his various contention he relied upon the judgment of the Allahabad High Court in the case of Karuna Shankar Tripathi v/s State of U. P. & Ors. reported in 1992 II CLR 484; and the judgment of the Andhra Pradesh High Court in the case of M. Raghuram v/s Labour Court, Hyderabad & Ors. reported in 1994 CLR 1089.

8. Adv. Shri G. K. Sardessai, representing the employer submitted on the other hand that the provisions of Sec. 25F of the Industrial Disputes Act, 1947 are applicable to a person who is employed as the words used in the said section are "a person who is employed" whereas an apprentice is not a person who is employed. He submitted that an apprentice is deemed to be a "workman" for other benefits under the Industrial Disputes Act, 1947 being that he cannot be terminated for misconduct unless he is issued a charge sheet and enquiry is held against him, and such other benefits. He submitted that chapter VA of the Industrial Disputes Act, 1947 is not applicable to the apprentice because the concept involved in the said chapter is that of continuous service, that is, employment and an apprentice is not a person who can be said to be in service. He submitted that the workman in para. 16 of his claim statement has admitted that he was a trainee and what was paid to him was stipend and not wages. He submitted that in the case of an apprentice there is no master and servant relationship. In support of his this contention he relied upon the judgment of the Karnataka High Court in the case of Thungabhdra Sugar Works Pvt. Ltd., Management v/s Presiding Officer, Labour Court and anr. reported in 1983 (46) FLR 190 and that of the Delhi High Court in the case of Kamal Kumar v/s J. P. S. Malik, Presiding Officer, Labour Court, Reported in 1998 II CLR 721. He submitted that in view of the above the question of complying with the provisions of section 25 F of the Industrial Disputes Act, 1947 did not arise in the case of the workman. He submitted that the services of the workman were terminated within the probation period, on the ground that his performance was not found satisfactory. He submitted that termination of service of a probationer on this ground is valid as there is no stigma attached to the said order. In support of his this contention he relied upon the judgment of the Kerala High Court in the case of Mathew P. Thomas v/s Civil Supplies Corporation reported in 2000 (3) L. L. N. 693. He submitted that the employer has led sufficient evidence before this Tribunal to prove that the performance of the workman was not satisfactory. He submitted that the Tribunal cannot sit over the assessment of the performance of the workman made by the employer. In support of his these contentions he relied upon the judgment of the Supreme Court in the case of Oswal Pressure Die Casting Industry, Faridabad v/s Presiding Officer and another reported in 1998 (2) LLN 67 and in the case of Krishnadevaraya Education Trust v/s L. A. Balakrishna reported in 2001 I CLR 534. He submitted that the workman has not produced any evidence to show that termination of his service is by way of malafides, victimisation and unfair labour practice. He submitted that since termination of service of the workman is valid the question of it being malafide or by way of unfair labour practice does not arise.

9. The workman as well as the employer have led evidence in the matter. Besides examining himself the workman has examined one Mr. Anthony Fonseca, whereas the employer has examined the Laboratory-In-Charge Mr. J. Kurian. It is an admitted fact that initially the workman was appointed as an apprentice for a period of two years from 15-5-74. The apprentice appointment letter dated 28-6-74 has been

produced by the workman at Exb. W-1. As per the said letter the workman was appointed as operative trainee. Clause 12 of the said appointment letter stated that the company did not guarantee any automatic confirmation in service at the end of the training period. As per the said appointment letter the two years apprenticeship period expired on 14-5-76. In view of clause 12 of the said appointment letter, at the end of the training period, the workman was not deemed to have been automatically confirmed in service. This means that the order confirming the workman in service had to be passed by the employer. On the contrary the workman was appointed on probation for a period of six months vide probationary appointment letter dated 25-5-76. The workman has produced this letter at Exb. W-2. Clause 8 of the said appointment letter stated that the workman was to be governed by the certified standing orders and the rules and regulations made by the company. Admittedly the services of the workman were terminated vide termination letter dated 30-10-76. The said termination letter has been produced by the workman at Exb. W-3. The said termination letter states that the services of the workman stood terminated with effect from close of work on 30-10-76. The contention of the workman is that his services were terminated during the probation period because the probation period is to be counted from 25-5-76, that is the date on which probation appointment letter was issued and not from 1-5-76 because probation cannot be with retrospective effect. Assuming that this contention of the workman is not correct and that the probation can be with retrospective effect, that is from 1-5-76, even in that case the termination of service will be during the probation period. This is because the probationary appointment letter states that the workman was to be on probation for six months w.e.f. 1-5-76. This means that the last date of the probationary period was to be 31-10-76. However, the employer terminated the services of the workman on 30-10-76 which is during the probation period.

10. The workman has contended that termination of his service amounts to retrenchment and since he had completed more than 240 days in service the employer ought to have complied with the provisions of Sec. 25F of the Industrial Disputes Act, 1947 (for short, " I. D. Act, 1947") and having not done so the termination is illegal. His contention is that the period of his service is to be counted from the date when he was appointed as an apprentice from 15-5-74 because the apprentice is a "Workman" under the I. D. Act, 1947 and as such the provisions of Sec. 25F of the I. D. Act, applied to him. This contention of the workman has been disputed by the employer. The question of determining whether the Apprentice is a "Workman" under the I. D. Act, 1947 or not and whether his service period from the date of his appointment as apprentice is liable to be counted or not for the purpose of Sec. 25F of the said Act will arise if the termination of service of the workman amounts to retrenchment. Therefore it is to be found out first whether termination of service of the workman is "retrenchment". What is "retrenchment" is defined under Sec. 2(00) of the I. D. Act, 1947 as follows:

Sec. 2(00):

(00) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include;

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health"

11. In the present case it is the case of the workman himself that his services were terminated during the probation period. The termination letter has been produced by the workman at Exb. W-3. In the said letter the ground for termination of service given is that the performance and attendance of the workman was not found satisfactory. Thus it is not the case of the employer that the services of the workman were terminated because he had committed misconduct. It is therefore to be seen whether this termination of service during the probation period amounts to retrenchment. In the case of M. Venugopal v/s Divisional Manager, LIC of India reported in (1994) 2 Sec. 323 the Supreme Court has held that the termination of service of a probationer in terms of appointment and service regulations does not amount to "retrenchment". In this case the services of the employee were terminated during the probation period. The contention of the employee was that it amounted to "retrenchment". Clause 10 of his appointment letter dealt with the minimum business that the employee was expected to do during the probation period. Clause 11 of the said letter stated that on his satisfactory completing the period of probation and his observation and compliance with all the conditions set out in the letter of appointment he will be confirmed in service. Regulation 14(4) of the Life Insurance Corporation of India (Staff) Regulations 1960 provided that during the period of probation an employee is liable to be discharged from service without any notice. The Supreme Court held that clause 10 and 11 of the order of appointment along with Regulations 14 shall be deemed to be stipulations of the contract of employment under which the services of the employee have been terminated. The Supreme Court held that any such termination even if the provisions of the I. D. Act are applicable in the case of the employee, shall not be

deemed to be "retrenchment" within the meaning of Sec. 2(00) of having been covered by exception (bb). The Supreme Court held that the termination of service of the employee was as a result of the Contract of Employment having been terminated under the stipulations provided under the Regulation 14 and the order of appointment of the employee and that non compliance of the requirement of Sec. 25F shall not vitiate or nullify the order of termination of the employee.

12. In the present case the employer has produced its certified standing orders which were in force at the time when the services of the workman were terminated. The said standing orders do not provide for termination of services of a probationer during the probationary period. The probationary appointment letter dated 25-5-76 Exb. W-2 only refers to the confirmation of the workman during the probation period or thereafter. There is no term or condition in the said appointment letter regarding his termination of service during probation period. Besides, clause (bb) of Sec. 2(00) of the I. D. Act 1947 was not in force at the time when the services of the workman were terminated, as his services were terminated on 30-10-76 whereas clause (bb) was introduced in Sec. 2(00) of the I. D. Act, 1947 by way of amendment with effect from 18th August, 1984. It has been already mentioned by me earlier that the services of the workman were not terminated on the ground of misconduct. Therefore, in the circumstances, the termination of service of the workman amounts to "retrenchment" within the meaning of Sec. 2(00) of the I. D. Act, 1947. The employer also has not disputed that the termination of service of the workman amounts to "retrenchment". The contention of the employer is that since the workman has not completed 240 days of service the question of complying with the provisions of Sec. 25 F of the Act did not arise.

13. The provisions of Sec. 25F of the I. D. Act, 1947 are applicable only in the case of a workman who is in continuous service for not less than one year. Sec. 25 B(2) of the Act defined "Continuous Service." It states that a person shall be deemed to be in continuous service under an employer for a period of one year, if the workman during the period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 240 days. The contention of the workman is that the period of 240 days are to be counted from the date when he was appointed as an apprentice. In other words, his contention is that the period of his apprenticeship is also liable to be taken into consideration because apprentice is a "workman" as per the definition given in the I. D. Act, 1947. In support of his contention he has relied upon the judgment of the Allahabad High Court in the case of Karuna Shanker Tripathi (supra) and that of the Andhra Pradesh High Court in the case of M. Raghuram (supra). In the case of Karuna Shankar Tripathi (supra) the Allahabad High Court came to the conclusion that the Petitioners were not appointed as an apprentice under the Apprentices Act, 1961 but were appointed as apprentice in the general sense of the term and hence they came within the ambit and scope of the definition of "workman" as defined under Sec. 2(s) U. P. Industrial Disputes Act. Sec.2(s) of the I. D. Act, 1947 is paramaterial with Sec. 2(2) of the U. P. Industrial Disputes Act. In this case the Allahabad High Court did not go into the aspect of employer-employee relationship. In the case of M. Raghuram (supra) the Madras High Court has held that when the Apprentice Act, 1961 is not applicable to an apprentice, the question for determination is whether there was employer-employee relationship during the period the person worked as an apprentice. The employer on the other hand has relied upon the judgment of the Karnataka High Court in the case Tungabhadra Sugar Works Pvt. Ltd., (supra) and that of the Delhi High Court in the case of Kamal Kumar (supra). in the case of Kamal Kumar, the Delhi High Court has held that the principle laid down by the Karnataka High Court in the case of Tungabhadra Sugar Works Pvt. Ltd., (supra) is the correct approach to decide as to whether a person comes or not within the ambit of the definition of 'workman' in Sec. 2(s) of the I. D. Act, 1947. The High Court held that the Petitioner had failed to prove that he was employed in the respondent company and that the Petitioner had failed to prove that he was employed in the respondent company and that also to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward. In the case of Tungabhadra Sugar Works Pvt. Ltd., (supra) the Karnataka High Court has held that any person whether he is an apprentice or not can be regarded as a workman only if he is employed in an industry to do any skilled, unskilled, manual, supervisory, technical or clerical work for hire or for reward whether the terms of employment are express or implied. The High Court has held that the existence of employer-employee relationship is the essence of the matter and that it is not enough to establish that the person claiming such a status is an apprentice. Therefore from the above judgments it is clear that an apprentice automatically does not acquire the status of a "workman". He has to prove the employer-employee relationship and also that he was employed to do any skilled, unskilled, manual, supervisory, technical or clerical work for hire or for reward.

14. The Certified Standing Orders of the employer define "Apprentice and Trainee" According to the said definition it means a learner who is paid a stipend and whose terms and conditions are governed by the provisions of Apprentices Act, 1961 and includes a trainee who is employed to undergo training and who is paid stipend during the period of training as per the terms and conditions of service. Thus as per the above definition the apprentice is only a learner or trainee who is paid stipend during the period of his learning or training . The Apprentice appointment letter dated 28-6-74 Exb. W-1(A) of the workman mentions that the workman is appointed as an operative trainee on the terms that (1) He will be on apprenticeship for a period of two years during which time his services can be terminated without notice and assigning any reason thereto. The company may at its discretion, extend his

apprenticeship for a further period. He may be absorbed in the employment of the company at any time during the apprenticeship period, or thereafter by the company at its discretion. His status as an apprentice will not change until it is changed otherwise in writing. (2) During the apprenticeship and thereafter until altered he will be given a consolidated stipend of Rs. 5/- per day for the first year and Rs. 6/- per day for the second year. He will not be entitled to any other allowance or benefits. (3) His appointment will take effect from 15-5-74. (4) After appointment he will not be permitted to hold any office of profit outside the company without the express permission of the company. (5) He is required to work on weekly holidays and/or festival holidays according to the rules of the company in force. (6) He will be liable to be transferred to any of the company's branches, factories, departments, associate concerns or any other position without assigning any reason and without any increase in the stipend. (7) He will not disclose any information relating to the company or its associates to any unauthorised person, firm or company whatsoever either during the currency of his apprenticeship with the company or after his termination. (8) He will be subject to the certified standing orders and the rules and regulations made by the company as are in force at present or as may be introduced or amended or extended from time to time. (9) On completion of the apprenticeship period, his services with the company as an apprentice will stand automatically terminated. (10) During the apprenticeship period, as stated above, he will not be entitled to any leave or any other benefits which accrue to regular employees. (11) Should be guilty of any misconduct during the period of apprenticeship he will be summarily dismissed from apprenticeship without notice or any compensation in lieu of notice. (12) The company does not guarantee any automatic confirmation in service at the end of the training period. The above terms and conditions have been accepted by the workman.

15. In the case of Sandeep Metal Craft (Private) Ltd., v/s Suresh D. Zanzad and another reported in 1994 II LLN 523, the Bombay High Court has held that when a person is doing on job training, the fact that he has worked would not clothe him with a status of an employee straightaway where it is specifically agreed to by him to be trained first in order to be appointed later on to work in the factory. The High Court has further held that the fact that certain payment is made during the apprenticeship by whatever name called and that the apprentice has to be under certain rules of discipline do not convert the apprentice to a regular employee under the employer, and that such a person remains a learner and is not an employee. The High Court further held that clause 4 of the appointment order of the respondent state that there will be training for six months which will be extendible by six months and clause 9 stated that on successful completion of the training, the incumbent may be considered for absorption in the suitable trade. The High Court held that this appointment order itself goes to show that the sine qua non of the appointment was the successful completion of the training and that unless the employee was trained and unless he had completed his training, he could not be absorbed. The High Court held that it thereby meant that till the training is not successfully completed, the person remains as an unabsorbed person and such a person could not be said to have acquired the status of an employee. In the case of Petroleum Employees Union v/s India Oil Corporation Ltd., and others reported in 2001 I CLR 785 the Bombay High Court has held that merely because the training scheme prepared by the Petitioner company provided for giving to the trainees stipend and the benefits which are to be paid under the Provident Fund, ESI and Bonus, the said trainees cannot be termed as "workman". In the case of Kamal Kumar (supra) The Delhi High Court has held as follows:

> "Admittedly in the present case the provisions of Apprenticeship Act is not applicable. During the period of training the Petitioner was given a stipend of Rs. 350/-. A close examination of the terms and conditions of the contract entered into between the petitioner and the respondents leads to the conclusion that the principal object with which the parties entered into the agreement of training was an offer by the employer to the petitioner to have an opportunity to learn Trade or Craft to acquire such knowledge that may be obtained in the course of training. From the above said terms of the agreement, it is clear that the petitioner was a mere trainee for particular period and for a distinct purpose and the respondent was not bound to employ him in their works after the period of training is over. It, therefore, cannot be said that the Petitioner was workman of the respondent company, in as much as, the purpose of engagement of the petitioner was only to offer him training under the terms and conditions stipulated above. No wage was paid to the petitioner as defined within the meaning of "wages" under the Industrial Disputes Act. Merely because some amount was paid to the petitioner as Provident Fund, it cannot be said that he has become a workman of the respondent company.

The Gujrat High Court in the case of Patel Pravin Kumar Somnath & ors. v/s Gujrat State Land Development Corporation Ltd., & ors reported in 1992 II CLR 429 in para 18 of the judgment has held as follows:

> "Under the terms of contract of Apprenticeship under which the Petitioners were engaged by the respondent corporation they were mere trainees for a period of one year and the respondent-corporation was not bound to employ them in their work after the training period was over. Such apprentices cannot be said to be employed in the work of the respondent--corporation or in connection with the work of the respondent corporation more so when they were not given wages and they were simply given stipend and when they were not entitled to any other benefits which were otherwise available to the regular employees. The dominant objects of the entire transaction is the contract of apprenticeship and the respondent corporation was to impart training as desired by the Central Government under the guidelines issued by the Central Government on the terms and conditions stipulated in the guide lines and the dominant object on the part of the petitioners

was to accept such training under certain terms and conditions which were specifically agreed upon by them. The fact that stipend was paid during the apprenticeship would not make any difference. The payment of stipend every month for a period of one year would not convert the contract of apprenticeship to that of a contract of service. Such a person who has agreed and entered into a contract of apprenticeship remains to be a trainee or learner and is not an employee. It is inherent in the word "apprentice" that there is no element of employment as such in a Trade or industry".

16. In my view if the above principles laid down by the Supreme Court and the High Courts in the Judgments above referred to are applied to the present case, the workman will not come within the ambit of the definition of "Workman" as defined in Sec. 2(s) of the Industrial Disputes Act, 1947. In the present case it is evident from the Apprentice appointment letter dated 28-6-74 that the workman had applied for apprentice as an operative trainee and in pursuance to the said application, the workman was interviewed and he was offered appointment as an operative trainee on the terms and conditions contained in the said letter. The apprenticeship period was to be for a period of two years and it was liable to be extended for a further period. The workman could be absorbed in the employment of the employer during the apprenticeship period or thereafter at the discretion of the employer, which means that the employer was not bound to employ him after his training period was over. He was not paid "wages" as defined under the Industrial Disputes Act, 1947 but he was paid stipend. He was not entitled to leave and other benefits which were enjoyed by the regular employees. His services with the employer as an apprentice stood automatically terminated on completion of the training period. Thus the terms and conditions of the agreement clearly show that the principal object of the agreement was an offer by the employer to the workman to have an opportunity to learn trade or craft and to acquire such knowledge that may be obtained during training. The workman was to remain as an unabsorbed person till he successfully completed the training and he could not be said to have acquired the status of an employee as per the principles laid down by the Bombay High Court in the Case of Sandeep Metal Craft (Private) Ltd. (Supra). The workman in his claim statement at para. 12 has admitted that he had completed two years on specialised training as Apprentice. Therefore applying the principles laid down by the Bombay High Court and other High Courts in the cases referred to and discussed by me above it is established that there was no employer-employee relationship between the employer and the workman when the workman worked with the employer as an apprentice. The workman was only a trainee. This being the case when the workman was appointed as an apprentice and he worked as such he did not fall within the meaning of "workman" as defined under the Industrial Disputes Act, 1947, and therefore the provisions of the said Act did not apply to him. This being the case the period of 2 years which he worked as apprentice cannot be considered for the purpose of calculating the period of 240 days or more of service with the employer, with regards to Sec. 25F of the Act.

17. Since it has been held by me that the workman when he worked as an apprentice did not come within the ambit of Sec. 2(s) of the I. D. Act, 1947, the period during which he worked as apprentice is liable to be excluded for the purpose of Sec. 25F of the I. D. Act, 1947. Therefore only the period during which the workman worked as a probationer is liable to be considered to find out whether he worked for minimum 240 days so that he could be covered by the provisions of Sec. 25F of the Act which is as regards the payment of retrenchment compensation. The probationary appointment letter of the workman has been produced at Exb. W-2. This letter is dated 25-5-76. It is contended on behalf of the workman that the probationary period starts from the date on which the said letter is issued and not from the date when it is made effective that is from 1-5-76. Even if the probationary period is counted from the date when it is made effective that is from 1-5-76 which infact is advantageous to the workman, still the number of days worked by the workman comes to less than 240 days. This is because the services of the workman were terminated on 30-10-1976 as per the termination letter dated 30th October, 1976 Exb. W-3. This means that the workman worked for only 6 months as probationer, that is, from May, 1976 to October, 1976. Thus the total number of days worked by the workman during the probation period comes to only 180 days. Therefore since the workman did not work for minimum 240 days prior to the date of termination of his service, the provisions of the Sec. 25F did not apply to him and therefore the question of complying with the conditions precedent for valid retrenchment did not arise. This being the case, I hold that there is no violation of the provisions of Sec. 25F of the I. D. Act, 1947 on the part of the employer in retrenching the services of the workman.

18. The workman has contended that the termination of his service by the employer is misconduct and therefore inquiry ought to have been held against him before terminating his service. The contention of the employer on the other hand is that the services of the workman were terminated because of unsatisfactory performance and not on account of any misconduct committed by him. The employer's contention is that sufficient evidence has been led to show that the performance of the workman was not satisfactory. The workman has not disputed that his services were terminated during probation period. The employer has relied upon the judgment of the Supreme Court in the case of Krishnadevaraya Education Trust (supra) and in the case of Oswal Pressure Die Casting Industry (supra). In the case of Krishnadevaraya Education Trust (supra) the Supreme Court in para. 5 of its judgment has held

that the employer is entitled to engage the services of a person on probation and if his services are not satisfactory, then the employer has a right to terminate the services as a reason thereof. The Supreme Court further held that if the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegations being made that the order itself casts a stigma. In para 6 of the judgment the Supreme Court has held that if such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. The Supreme Court held that mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the workman were being terminated by way of punishment. The Supreme Court has further held that the probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment the right to terminate the services. In the case of Oswal Pressure Die Casting Industry the Supreme Court has laid down the principle that if the services of a probationer are terminated during the probation period on the ground of his unsatisfactory performance, the employer has to adduce evidence to show that the work of the probationer employee was not satisfactory. The employer has also relied upon the judgment of the Kerala High Court in the case of Mathew P. Thomas (supra). In this case relying upon the judgment of the Supreme court in the case of State of Orissa v/s Ram Narayan Das reported in AIR 1961 SC 177, the Kerala High Court has held that the mere use of the expression "unsatisfactory service" in the order of termination will not amount to a stigma vitiating the said order. The High Court has held that if while passing the order the appellant was stamped as a person of "bad reputation", "corrupt", and "unreliable officer who had outlived his utility" or that the employer had lost confidence in him, it would have been possible for the Court to hold that it is a clear case of stigma and the order of termination is punitive and being so, it should have been preceded by a full fledged departmental enquiry under the relevant rules. Thus, the law laid down is that the employer has the right to terminate the services of a probationer during the probation period if he finds that the performance of the workman is unsatisfactory, and there is no stigma attached to this order. However, if this order is challenged, the employer has to produce evidence to show that the work of the probationary workman was not satisfactory.

19. In the present case the order of termination of service dated 30-10-1976 has been produced by the workman at Exb. W-3. The said order simply states that the termination of service is because the workman's performance and attendance was not found satisfactory. No allegations whatsoever imputing stigma are made in the said order, nor the said order suggests that the termination is on account of the misconduct committed by the workman. The employer's contention is that they have led evidence to show that the workman's performance and attendance was not satisfactory. The employer has examined Mr. J. Kurian, the Laboratory-In--Charge. He has stated that the workman was working under him. He has admitted that the letter dated 18th August, 1976 Exb. E-1 was issued to the workman by him. He has stated that the said letter was issued by him based on the report dated 12-8-76 of Mr. Hariharan. The said report has been produced by the employer at Exb. E-2. The workman in his evidence as well as in the cross examination of the employer's witness Shri J. Kurian has taken the stand that he did not accept the letter dated 18th August, 1976 Exb. E-1 because the muster batch number mentioned in the said letter as 23 was changed to 244. In his evidence he has stated that the said number was changed by Mr. Kurian in his presence whereas in the cross examination it was suggested to Mr. Kurian that the number was changed at his instance and not that it was changed by him in his presence. However, changing of the number has been admitted by the employer's witness Mr. Kurian. He has stated that he has himself changed the number because it was wrongly written as 23 when in the report dated 12-8-76 submitted by Mr. Hariharan the muster batch number was mentioned as 244. The report dated 12-8-76 has been produced at Exb. E-2. This report mentions the number as 244 and not 23. It is not the case of the workman that the number in the report was also changed from 23 to 244. Mr. Kurian has stated in his evidence that his letter dated 18th August, Exb. E-1 was based on the said report. Therefore there is nothing wrong in the said letter dated 18-8-76 and it is liable to be accepted. The said letter mentions the workman had tested the samples of the 244 muster batch without pressing it in the compressed airline which was a lapse on his part. This letter of Mr. Kurian is based on the report dated 12-8-76 Exb. E-2. The employer has also produced the memo dated 24-8-76 Exb. E-4 issued by Mr. Kurian to the workman. This memo is based on the report dated 14-8-76 Exb. E-3 sent to him by the shift Supervisor Mr. Mutthu Kumar. Though in his deposition, the workman stated that he had not received the memo dated 24-8-76 Exb. E-4, in his cross examination he admitted that the signature in green ink on the left side of the said memo/letter appears to be his and that he signed it in token of having received the said letter, though thereafter he stated that though the signature looks like his, he has not signed it. This subsequent statement of the workman appears to be an after thought. However his signature has been identified by the employer's witness Mr. Kurian. He was not cross examined by the workman on this aspect. The memo dated 24-8-76 Exb. E-4 mentions that chemical packets of 97 stock compounded by him when were cross checked for weights by the Supervisor large deviations were seen which was a serious quality lapse. The deviations found are mentioned in the said letter. The employer's witness Mr. Kurian has stated that because of the deviations the tyres manufactured would have gone scrap. The employer has produced warning letters dated 14-9-76 and 16-10-76 issued to the workman. The warning letter dated 14-9-76 was for unauthorised absence for 7 days in the month of August, 1976 and the warning letter dated 16-10-76 was for 6 days

unauthorised absence in September, 1976. The workman has not denied these warning letters. The employer has also produced the muster roll for the month of August and September, 1976 at Exb. E-5 and E-6 respectively. These muster rolls are not disputed by the workman nor the employer's witness Mr. Kurian has been cross examined in this respect. The above muster roll proves that the unauthorised absence of the workman in the month of August and September, 1976 as mentioned in the warning letters. The workman in his evidence also has admitted the muster rolls shown to him showing the dates on which he remained absent in the month of September and October, 1976. The employer has also produced the reply dated 26th November, 1976 given by the workman to the termination letter at Exb. E-10. In this reply the workman has admitted that he was warned for his absence and stated that he had improved his attendance. He has stated in the reply that the mistakes committed by him are not so serious as to terminate his services. He has stated that on receipt of the warning he has improved in his attendance as well as in attention to his work. Thus it can be seen that the employer has led sufficient evidence to show that the performance of the workman during the probation period was not satisfactory. The employer was therefore within its right to terminate the services of the workman on the ground of unsatisfactory performance. The Supreme Court in the case of Oswal Pressure Die Casting Industry (supra) has held that it is not open for the Court to sit in appeal over the assessment made by the employer of the performance of the employee. The Supreme Court has held that once it is found that the assessment made by the employer was supported by some material and was not malafide it is not proper for the Court to interfere and substitute its satisfaction with the satisfaction of the employer.

20. The workman has contended that termination of his service by the employer is by way of victimisation and unfair labour practice. However, no evidence whatsoever has been led by the workman to prove this contention. On the other hand the employer has led evidence to show that the performance of the workman was not satisfactory. The workman in his cross examination has admitted that he was not the office bearer of the union. He has stated that a little more than four persons were removed from service at the end of the probation period in addition to his termination of service on 30-10-76. He has given the names of the probationers whose services were terminated. The workman's witness Mr. Anthony Fonseca has admitted in his cross examination that the employer in the course of 10 years had terminated the services of 50 workmen on the ground that their services were not found satisfactory during probation period. The above evidence therefore disproves the contention of the workman that termination of his service by the employer is by way of victimisation and unfair labour practice, or that it is malafide.

In the light of what is discussed above I hold that the employer has succeeded in proving that the services of the workman were terminated legally and for good reasons. I, therefore answer the issue No. 1 in the affirmative. I, further hold that the workman has failed to prove that termination of his service is malafide and by way of victimisation and unfair labour practice. I therefore answer the issue No. 2 in the negative.

21. *Issue No.:* 3 In my view this issue has been wrongly framed. In fact the question of framing such an issue does not arise. The question is not whether the workman is unable to find out an alternate employment, but the question is whether the workman is gainfully employed after termination of his service. This is because if a workman succeeds in the reference the relief is liable to be moulded in accordance with his gainful employment. In my view therefore the question of deciding this issue does not arise. I, therefore answer this issue accordingly.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s Madras Rubber Factory Ltd., Tisk-Usgao, Ponda, in terminating the services of Shri Sakharam M. Sawant, w. e. f. 30-10-76 is legal and justified. It is hereby further held that Shri Sakharam M. Sawant is not entitled to any relief.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 5-8-2002 in Reference No. IT/29/94 given by the Industrial Tribunal, Panaji--Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Angela Menezes, Joint Secretary (Labour).

Panaji, 27th August, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/29/94

Workmen,
Rep. by Goa Trade & Commercial
Workers' Union,
Velho's Building, 2nd Floor,
Panaji-Goa. — Workman/Party I

V/s.

M/s. Seahorse Maritime Services Pvt. Ltd.,
Commerce Building, 5th Floor,
Vasco-da-Gama, Goa. — Employer/Party II

Workman/Party I - Represented by Adv. Shri Suhas Naik.

Employer/Party II-Represented by Adv. Shri Ulhas Shirodkar.

Panaji, dated: 5-8-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 19-5-1993 bearing No. 28/26/93-LAB referred the following dispute for adjudication by this Tribunal.

"Whether the action of the management of M/s. Seahorse Maritime Services Pvt. Ltd., Vasco, in terminating the services of Shri Andrian Vincent Pinto, with effect from 30-7-1992, is legal and justified?

If not, to what relief the workman is entitled ?"

2. On receipt of the reference a case was registered under No. IT/29/94 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party I (for short, "workman") filed his statement of claim at Exb. 3. The facts of the case in brief as pleaded by the workman are that he was working with the Employer/Party II (for short, "employer") as a shipping assistant doing all clerical jobs. He was appointed on probation for a period of 6 months vide letter dated 24-9-01. That on the expiry of probationary period his probation was not extended nor his services were terminated and as such he was deemed to have been confirmed in service and was entitled to protection under Industrial Disputes Act, 1947 (for short, "I. D. Act, 1947"). That he received a letter from the employer dated 28-7-92 stating that his services were terminated due to slack business and he was asked to contact the Accounts Department to find out about details of his legal dues. That he met the Accountant of the employer but he refused to pay his legal dues and even his earned wages for July, 1992 were not paid. That thereafter he raised the industrial dispute before the Asst. Labour Commissioner, Vasco, Goa, and the copy of the said dispute was sent to the Managing Director. That settlement could not be arrived at in the conciliation proceedings and therefore failure was recorded on 22-12-92 and failure report dated 5-4-93 was sent to the Government. The workman contended that termination of his service is illegal as the employer did not comply with the provisions of Sec. 25F of the I. D. Act, 1947. The workman contended that he is entitled to reinstatement in service with full back wages and continuity of service.

3. The employer filed written statement at Exb. 4. The employer stated that the reference is not maintainable as the State Government has no jurisdiction to refer the dispute and the appropriate Government is the Central Government. The employer stated that the workman was appointed as the shipping assistant w.e.f. 11-10-91 as a probationer vide letter dated 24-9-91. The employer stated that as per the appointment letter the workman was deemed to have continued on probation till he received written confirmation order and that no confirmation letter was issued to him. The employer stated that it had no business and therefore its activities were closed and the services of the workman were terminated. The employer stated that the workman had not worked for 240 days and hence he was not entitled to notice pay and retrenchment compensation. The employer denied that the workman stood automatically confirmed or that he was protected under I. D. Act, 1947. The employer stated that since the workman was not entitled to notice pay and retrenchment compensation the question of complying with the provisions of Sec. 25F of the I. D. Act, 1947 did not arise. The employer denied that termination of service of the workman is illegal and unjustified or that he is entitled to any relief as claimed by him. The workman thereafter filed rejoinder at Exb. 5. The workman stated that the employer had participated in the conciliation proceedings and at no point of time any objection was raised that the State Government had no jurisdiction to refer the dispute.

4. On the pleadings of the parties, following issues were framed at Exb. 6.

1. Whether Party II poves that the appropriate Government is the Central Government and hence the reference made by the State Government is without jurisdiction ?

2. Whether Party I proves that Party II did not comply with the provisions of sec. 25F of the I. D. Act, 1947 and hence the termination of his services by party II is illegal ?

3. Whether Party I proves that the termination of his services by Party II w.e.f. 30-7-92 is illegal and unjustified ?

4. Whether Party II proves that the termination of services of Party I is on account of the closure of the activities of the establishment of Party II ?

5. Whether Party I is entitled to any relief ?

6. What Award ?

5. My findings on the issues are as follows:

1. *Issue No. 1:* In the negative.
2. *Issue No. 2:* In the affirmative.
3. *Issue No. 3:* In the affirmative.
4. *Issue No. 4:* In the negative.
5. *Issue No. 5:* As per para. 15 below.
6. *Issue No. 6:* As per order below.

REASONS

6. *Issue No. 1*: Since it is the employer who raised the contention that the appropriate Government is the Central Government and that therefore the State Government could not have referred the dispute to this Tribunal for adjudication, the burden was cast on the employer to prove the same. The Bombay High Court in the case of R. M. Nerlekar v/s The Chief Commercial Supdt., Central Rly, Bombay reported in 1991 II CLR 789 has held that it is a trite law that a party who sets up a defence of ouster of the jurisdiction of Tribunal must prove the material requisite for supporting such a plea. In the present case the employer wanted to ouster the jurisdiction of this Tribunal to decide the dispute on the ground that it is the Central Government who could refer the dispute for adjudication and not the State Government. Therefore the burden was on the employer to prove this fact.

7. In the present case only the workman has led evidence by examining himself. After the workman's evidence was closed on 15-9-97 the case was fixed for employer's evidence. Since inspite of the opportunity given, no evidence came to be led on behalf of the employer, the employer's evidence was closed on 8-1-98. However subsequently an application was filed on behalf of the employer for setting aside the order closing their evidence. After hearing the parties by order dated 19-3-98, the order closing the evidence of the employer was set aside and the employer was permitted to lead evidence. However again inspite of the several opportunities given the employer did not lead evidence and therefore the employer's evidence was again closed on 9-2-99 and the case was fixed for final arguments. Thereafter again another application was filed by the employer on 9-3-99 praying for setting aside the order dated 9-2-99 closing their evidence. After hearing the parties, this Tribunal passed an order dated 22-9-2000 dismissing the said application dated 9-3-99 filed by the employer. Thus in the present case there is no evidence from the employer.

8. As mentioned earlier the workman has led evidence by examining himself. He has been cross examined on behalf of the employer. However in the evidence of the workman nothing has been brought on record to prove that the Central Government is the appropriate Government and that therefore the State Government could not have made the reference. Even suggestion was not put to the workman that the reference is not maintainable because the State Government could not have made the reference. In the circumstances there is absolutely no evidence from the employer to prove that the reference is not maintainable. I, therefore hold that the employer has failed to prove that the Central Government is the appropriate authority and as such the State Government could not have made the reference and that therefore the reference is not maintainable. Hence, I answer the issue No. 1 in the negative.

9. *Issue Nos. 2 and 3:* Both these issues are taken up together because they are interrelated. The contention of the workman is that at the end of the probation period of six months his probation period was not extended by the employer and hence he was deemed to have been confirmed in service. His contention is that he had worked for 240 days prior to termination of his service and therefore the employer ought to have complied with the provisions of Sec. 25F of the I. D. Act, 1947 by paying him notice pay and retrenchment compensation at the time of termination of his service. The workman's contention is that since the employer did not comply with the provisions of Sec. 25F of the I. D. Act 1947, the termination of his service is illegal and unjustified.

10. The first question for considering is whether the workman was deemed to be confirmed on completion of the probation period of six months, because on completion of six months probation period his probation period was not extended. The appointment order dated 24th September, 1991 has been produced by the workman at Exb. W-1. The said letter states that the workman is appointed on probation initially for a period of six months w.e.f. 1-10-97. The said letter further states that on satisfactory completion of probation he may be eligible to be confirmed in the post on a suitable salary to be decided and that the employer will be the sole judge in this matter. It is the case of the workman as well as that of the employer that on completion of the probation period of six months the services of the workman were not terminated nor the probation period of the workman was extended on completion of the probation period of six months. The Supreme Court in the case of State of Punjab v/s Dharam Singh reported in AIR 1968 SC 1210 in para. 3 of its judgment has held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in the post as a probationer only in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. The Supreme Court held that in such a case an express order of confirmation is necessary to give the employee a substantive right to the post and from the mere fact that he is allowed to continue in the post after expiry of the specific period of probation it is not possible to hold that he should be

deemed to have been confirmed. The Supreme Court has further held as follows:

> "..... The reason for this conclusion is that where on the completion of the specific period of probation the employee is allowed to continue in the post without an order of confirmation, the only possible view to take in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all these cases, the conditions of service of the employee permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period..."

The supreme Court in the case of Kedar Nath Bahl v/s State of Punjab and others reported in AIR 1972 SC 873 has also laid down the same principles. In this case the Supreme Court in para. 9 of its judgment has held that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation authomatically even if no order is passed in that behalf. The Supreme Court held that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation and that at the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer. The workman has relied upon the judgment of the Supreme Court in the case of Wasim Beg v/s State of Uttar Pradesh & Others reported in 1998 I LLJ 193 in support of his contention that he is deemed to be confirmed in service. I have gone through this judgment of the Supreme Court, and I am of the view that the same is not applicable to the workman. In the case before the Supreme Court the Service rules of the Corporation provided that during the probation period the performance of the employee will be watched and the appointing authority will issue a certificate of having satisfactorily completed the probation and that the appointing authority has discretion to extend the period of probation without any reason. The rule relating to confirmation provided that an employee shall be deemed to have become a confirmed employee in the grade after he has successfully completed the period of probation. The Supreme Court held that from the affidavit filed by the respondent Corporation as also on looking at the report submitted by the Managing Director to the Board of Directors it is clear that the appellant was considered by the respondents as having satisfactorily completed his period of probation on 9-1-1979 and he was confirmed as regular employee from 10-1-1979. Therefore applying the provisions relating to confirmation in the service rules of the Corporation, which stated that on successfully completing the period of probation, the employee shall be deemed to be confirmed in service, the Supreme Court held that the appellant was not a probationer when he was discharged from service but was a confirmed employee. The facts involved before the Supreme Court in the above referred case are different from the one involved in the present case. I would like to point out that the Supreme Court in the above referred case of Wasim Beg (supra) referring to its various earlier decisions has held that in the cases where there is no maximum period prescribed for probation and either there is a rule providing for extension of probation or there is a rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of employee, unless there is such an order of confirmation, the period of probation would continue and there will be no deemed confirmation at the end of the prescribed probationary period.

11. In the present case the appointment order of the workman produced at Exb. W-1 states that the workman was appointed on probation initially for a period of six months. This means that his probation period could be extended by the employer. The said appointment order further states that on completing the probation period satisfactorily he was eligible for confirmation and the employer was the sole judge in his respect. This means that the confirmation order was required to be issued by the employer. Therefore applying the law laid down by the Supreme Court in the case of Dharam Singh (supra), Kedarth Bahl (supra) and Wasim Beg (supra) the workman could not be deemed to be confirmed in service on completion of the initial probation period of six months. In the absence of the confirmation order from the employer, the workman continued to be in service on probation till the date his services were terminated. Thus there is no substance in the contention of the workman that he was deemed to have been confirmed in service on completion of the probation period of six months.

12. The workman has relied upon the judgment of the Karnataka High Court in the case of Hutchiah v/s Karnataka State road Transport Corporation reported in 1983 I LLJ pg. 30. In this judgment the Karnataka High Court has held that the probationer is a workman as defined under Sec. 2(s) of the I. D. Act, 1947. In my view this is a settled law. The contention of the workman is that termination of his service is illegal because the employer did not comply with the provisions of Sec. 25F of the I. D. Act, 1947. The question of complying with Sec. 25F arises only if the termination of service amounts to "retrenchment". It is therefore to be seen whether in the present case termination of service of the workman amounted to retrenchment. Sec. 2(00) of the I. D. Act 1947 defines retrenchment as follows:

> (00) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include;
>
> (a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health"

The services of the workman were terminated with effect from 30-7-1992. The said termination order has been produced at Exb. E-2. The ground for termination of service is given as due to the slack business, and that there is no chance of improving the business in the near future. Thus, the termination order shows that the services were not terminated because he had committed any misconduct. It has been held by me that till the date of termination of service the workman continued to be on probation. The Supreme Court in the case of M. Venugopal v/s divisional Manager, LIC of India, reported in (1994) 2SCC 323 has held that the termination of Service of a probationer in terms of appointment and service regulations does not amount to "retrenchment", because such a termination is covered by exception (bb) to Sec. 2(00) of the I. D. Act 1947. In the present case the service regulations of the employer are not on record. The appointment letter does not provide for termination of service of the workman during the probation period. The said letter only refers to the confirmation of the workman after completing the probation period satisfactorily. There is no term or condition in the said letter of appointment regarding his termination of service during probation period. It has been already mentioned by me earlier that the services of the workman were not terminated for misconduct. The termination does not fall under any of the exception laid down under Sec. 2(00) of the I. D. Act, 1947. The Supreme Court in the case of Santosh Gupta v/s State Bank of Patiala reported in 1980 II LLJ 72 has held that every type of termination of service of a workman except of the types specifically excepted amounts to retrenchment. In the light of what is discussed above, I hold that termination of the workman amounts to retrenchment within the meaning of Sec. 2(00) of the I. D. Act 1947. Infact the employer in its written statement did not deny that termination of service of the workman amounted to retrenchment. The defence of the employer is that the question of complying with the provisions of Sec. 25F did not arise because the workman did not complete 240 days of service.

13. The provisions of Sec. 25F of the I. D. Act, 1947 prescribes the procedure for retrenching the services of a workman. It lays down that the services of a workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of one month's notice and he has been paid compensation at the rate of 15 days average wages per each completed year of service or any part thereof in excess of six months. Sec. 25(B) of the I. D. Act, 1947 defines "Continuous Service". It states that a person shall be deemed to be in continuous service under an employer for a period of one year, if the workman during the period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine and 240 days in any other case. In the present case admittedly the workman was not employed beyond ground in a mine. The workman was employed from 1-10-91. This is evident from the letter of appointment dated 24-9-91 Exb. W-1 itself. As per the letter dated 28-7-92 Exb. W-2 the employer terminated the services of the workman from 30-7-92. This fact is admitted by the employer also. There is no evidence to show that the workman was given any break in service at any time. This means that the workman was in continuous service from the date of his employment till the date of his termination of service, that is, from 1-10-91 to 30-7-92 that is for a period of 10 months. Thus, the total number of days worked by the employer prior to the date of termination of his service comes to more than 240 days. Therefore the workman is well covered by Sec. 25 B of the I. D. Act, 1947 and consequently, the provisions of Sec. 25F of the Act applied to him. The Supreme Court in the case of M/s Avon Services Production Agency Pvt. Ltd., v/s Industrial Tribunal, Hariyana and other reported in AIR 1970 SC 170 has held that giving notice and payment of compensation is a conditions precedent for valid retrenchment and failure to comply with the provisions prescribing the conditions precedent for valid retrenchment Sec. 25F renders the order of termination invalid and in operative. Same principles are laid down by the Supreme Court in the the case of Gammon India Ltd., v/s Niranjan Das reported in (1984) I SCC 509. In this case the Supreme Court has held that in the absence of compliance with the requisites of Sec. 25F, the retrenchment bringing about the termination would be void ab-initio. In the present case here is no evidence that notice pay and retrenchment compensation was paid to the workman at the time when his services were terminated. In fact the employer has taken the defence that since the workman did not complete 240 days of service, the question of complying with the provisions of Sec. 25F of the I. D. Act, 1947 did not arise. Therefore, admittedly there is no compliance of the provisions of Sec. 25F of the I. D. Act, 1947 from the employer at the time when the services of the workman were terminated. In the circumstances termination of service of the workman by the employer becomes illegal and unjustified. I, therefore hold that the workman has succeeded in proving that the action of the employer in terminating his services with effect from 30-7-92 is illegal and unjustified and hence I answer the issue Nos. 2 and 3 in the affirmative.

14. *Issue No. 4:* In the written statement filed by the employer, the defence which was taken is that it had no business and hence its activities were closed and the services of the workman were terminated. Therefore the burden was cast on the employer to prove that its activities were closed. As mentioned earlier there is no evidence from the employer. The only evidence which is there is there from the workman. Except for suggesting to the workman in his cross examination that his services were terminated because it had no stewarding or agency work and that it closed its business on the date of termination of his service, there is no evidence whatsoever from the employer on the above facts. The workman had denied the above suggestions put to him. The termination order dated 28-7-92 which has been produced at Exb. E-2 does not state that the services of the workman are terminated because of the closure of the business of the employer nor the said order shows that the employer closed its business on the date of termination of service of the workman. The ground for termination of service is given as slack business and there being no chance of improving the business in near future. Therefore the contention of the employer that services of the workman were terminated because there was no work and that hence the business of the employer was closed on the date of termination of service of the workman is not correct. The employer has produced its reply dated 17-9-92 Exb. E-2 filed before the Asst. Labour Commissioner in the conciliation proceedings. In this reply no where it is stated by the employer that its business is closed from the date of termination of service of the workman. Infact in this reply there is no mention about closing of the business. In the circumstances, I hold that the employer has failed to prove that the termination of service of the workman was on account of the closure of its activities. I therefore answer the issue No. 4 in the negative.

15. *Issue No. 5:* This issue pertains to the relief to be granted to the workman. I have held that the termination of service of the workman by the employer with effect from 30-7-92 is illegal and unjustified. The normal rule is that when the termination of service of a workman is held to be illegal and unjustified he should be reinstated in service with full back wages unless there are reasons which do not warranty reinstatement or full back wages. In the present case I do not find any reason to deviate from this normal rule. The Supreme Court in the case of State Bank of India v/s N. Sundara Money, reported in AIR 1976 SC 1111 has held that once it is held that there is violation of Sec. 25F of the I. D. Act 1947 and as such the termination is illegal, the necessary consequence to follow is the reinstatement of the workman, with back wages. In the present case there is no evidence on record to show that the past conduct of the workman was not good, nor there is any evidence on record to show that the workman is or was gainfully employed after his services were terminated. In the circumstances, I hold that the workman is entitled to reinstatement in service with full back wages, and all other consequential benefits. I therefore pass the following order.

ORDER

It is hereby held that the action of the Management of M/s Seahorse Maritime Services Pvt. Ltd., Vasco, in terminating the services of Shri Andrian Vincent Pinto, with effect from 30-7-1992 is illegal and unjustified. Shri Andrian Vincent Pinto is ordered to be reinstated in service with full back wages and other consequential benefits.

No order as to costs. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

Order

No. 28/7/2001-LAB

The following Award dated 19-9-2002 in Reference No. IT/63/99 given by the Industrial Tribunal, Panaji--Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Sanjiv M. Gadkar, Under Secretary (Labour).

Panaji, 7th October, 2002.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/63/99

Shri Pascoal Soares rep. by
The President,
Goa Trade and Commercial
Workers Union,
Velho's Building, 2nd Floor,
Panaji-Goa. — Workman/Party I

V/s.

M/s. Dynamic Builders,
City Centre, Feira Alta,
Opp. Drug. House,
Mapusa, Bardez Goa. — Employer/Party II

Workman/Party I - Represented by Adv. Shri Suhas Naik.

Employer/Party II-Represented by Adv. Shri V. Kamat.

Panaji, dated: 19-9-2002.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 22-6-99 bearing No. ITM/CON-MAP/ /(84)/97/3058 referred the following dispute for adjudication of this Tribunal.

1. "Whether the action of the management of M/s. Dynamic Builders, Mapusa-Goa, in refusing

employment to Shri Pascoal Soares, In-Charge/ /Mechanic, with effect from 12-7-1997, is legal and justified ?

2. If not, to what relief the workman is entitled ?

2. On receipt of the reference a case was registered under No. IT/63/99 and registered A. D. Notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workman/Party-I (for short 'workman') filed his statement of claim at Exb. -5. The facts of the case in brief as pleaded by the workman are that he was employed with the employer/ /Party-II (for short 'employer') as a In-charge/Mechanic on monthly salary of Rs. 3400/-. That somewhere in the month of December, 1996 the employer asked the workman to go and work at Osborne Hotel and accordingly he continued working there till 12-7-97 when he received a letter from the employer stating that his services were terminated. The workman contended that termination of his services by the employer is illegal, unjustified and bad in law. The workman contended that at the time of termination of his services he was not paid his legal dues including his salary for the month of May, June and July, 97. That by letter dated 16-7-97 the workman through his union requested the employer to reinstate him in service with full back wages but the employer did not agree to the request of the workman. That the conciliation proceedings held by the Labour Commissioner were decided ex-parte because none appeared on behalf of the employer in the conciliation proceedings. The workman contended that since termination of his services is illegal and unjustified he is entitled to reinstatement in service with full back wages and continuity in service.

3. The employer filed written statement at Exb.-6. The employer stated that the workman is not a "workman" under Section 2(s) of the Industrial Disputes Act, 1947 as he was appointed as a Site Supervisor on the construction site of the employer and he was drawing wages of Rs. 3400/- p. m. at the time of termination of services of the workman. The employer stated that as a site Supervisor the main duties of the workman were to supervise the work of the contract labour employed by the employer through the Labour contractors. The employer stated that due to the recession in the construction activities and real estate the employer was in financial crisis and had to stop construction activities and in fact the workman himself stopped attending the work from May, 1997 as the construction activities were completely stopped by the employer in March/April 97. The employer stated that on 24-6-97 a notice of termination was issued to the workman informing him that his services will not be required from 1-7-97 and that he shall be paid one month's wages in lieu of notice. The employer stated that the workman refused to accept the said letter and therefore it was sent by registered A. D. post which was received by him on 12-7-97. The employer stated that the workman was required to collect his legal dues from the office during office hours but the workman did not collect the same. The employer stated that the termination of services of the workman was on account of closure of construction activities and therefore their action is legal, just and bonafide. The employer denied that the workman is entitled to any relief as claimed by him. The workman thereafter filed rejoinder at Exb. 7.

4. On the pleadings of the parties issues were framed at Exb. 8 and thereafter the case was fixed for recording the evidence of the workman. However before the evidence was recorded parties submitted that they are trying to arrive at an amicable settlement and at their request the case was fixed on 17-6-2002 for filing the terms of settlement. Accordingly on 17-6-2002 the workman appeared along with his Advocate Shri Suhas Naik and Advocate Shri V. Kamat appeared on behalf of the employer. They submitted that the dispute between the parties was amicably settled and they filed the terms of settlement dated 17-6-2002 at Exb. 15. The parties prayed that consent award be passed in terms of the settlement. I have gone through the terms of the settlement which are duly signed by the parties and their respective Advocates. I find that the terms of the settlement are certainly in the interest of the workman. I, therefore accept the submissions made by the parties and pass the consent award in terms of the settlement dated 17-6-2002 Exb. 15.

ORDER

1. It is agreed between the parties that the employer shall pay an amount of Rs. 27,000/- (Rupees twenty seven thousand only) to the workman.

2. It is agreed between the parties that in view of the clause (1) above, the workman does not press for reinstatement in service with back wages and other benefits.

3. It is agreed between the parties that the amount agreed shall be paid to the workman on signing of this settlement.

4. It is agreed and declared by the workman that the amount payable by the employer to the workman in the manner hereinabove provided for are in full and final settlement and satisfaction of all claims of the workman payable by the Company including claims for compensation for loss of office or otherwise howsoever.

No order as to cost. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

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